Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

THOMAS WILLIAMS, ET A L.,
Petitioners

v.

CHARLES S. RENCHENSKI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a convicted prisoner have a constitutionally protected liberty interest in not attending an in-prison sex offender treatment program?

PARTIES TO THE PROCEEDING

The petitioners are the Pennsylvania Department of Corrections, an agency of the Commonwealth of Pennsylvania, and the following named individuals who are presently or were formerly employed by the Pennsylvania Department of Corrections: Thomas Williams, Joseph Piazza, Larry Kaskie, Frank Gillis, Kandis K. Dascani, John Sidler, and Sharon M. Burks.

The respondent is Charles S. Renchenski.

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OPINIONS BELOW

The decision of the Court of Appeals is reported at 622 F.3d 315 and is reprinted in the appendix to this petition ("Pet. App.") at 3a. The decision of the District Court is not reported, but is reprinted at Pet. App. 50a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 2010. A petition for rehearing was timely filed and was denied on October 28, 2010. Pet. App. 1a-2a. This petition is being filed within ninety days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment to the Constitution provides in relevant part that "No State shall ... deprive any person of life, liberty, or property, without due process of law . . . ."

2. The Fifth Amendment to the Constitution provides in relevant part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

STATEMENT OF THE CASE

Pennsylvania's Department of Corrections ("DOC") houses over fifty thousand prisoners. Upon reception, each prisoner is given a comprehensive assessment of his medical, psychological, educational, vocational and other needs. This information is used to develop a correctional plan tailored to address the particularized needs of each prisoner. *See* PENNSYLVANIA DEPARTMENT OF CORRECTIONS, *A Handbook for the Families and Friends of Pennsylvania Department of Corrections Prison Inmates* (Nov. 2006), p. 13-15, *available at* http://www.cor.state.pa.us (visited Jan. 24, 2011).

One of the tools which the DOC uses to further its goal of rehabilitation is the Sex Offender Treatment Program ("SOTP"). The SOTP is similar to other treatment programs routinely offered to prisoners such as those for drug and alcohol abuse, domestic abuse, anger management, and HIV/AIDS education. The Court of Appeals, however, held that requiring a prisoner to participate in a SOTP implicates a liberty interest protected by the Fourteenth Amendment; if, as in this case, the prisoner has not actually been convicted of a sex offense, the Court of Appeals held that extensive procedural protections – identical to those necessary to commit a prisoner to a mental institution – must be provided.

The Court should review this decision because (a) the courts of appeals are divided over whether – and under what circumstances – a prisoner has a liberty interest in not being labeled a sex offender; (b) it presents important and recurrent issues for prison

administration on which the Court should provide guidance; (c) it improvidently extends the holding in *Vitek v. Jones*, 445 U.S. 480 (1980) and *Washington v. Harper*, 494 U.S. 210 (1990) to treatment programs routinely provided to prisoners within the general prison environment; and (d) it is fundamentally at odds with the holding in *McKune v. Lile*, 536 U.S. 24 (2002).

1. Pennsylvania adopted its state-wide SOTP, entitled "Responsible Living: A Sex Offender Treatment Program," in 1999.[1] Pet. App. 6a-7a. It consists of a seven step behavior modification program, but does not include the administration of any type of medication. *Id.* For prisoners assessed as moderate to high risk, it consists of a weekly two-hour group therapy session which runs for approximately two years. *Id.* The SOTP is supervised by a Licensed Psychologist Manager and individual groups are run by qualified professionals who have at minimum a bachelor's degree in behavioral health and significant prior experience with sex offender treatment. *Id.* at 8a. Prisoners convicted of sex offenses (e.g. rape, sexual assault, involuntary deviate sexual intercourse, etc.), are automatically assigned to SOTP. *Id.* at 6a, fn.3. In addition, prisoners who have a prior history of sexual offenses or whose convictions had an underlying sexual component may also be required to participate in SOTP as part of their overall rehabilitative plan. *Id.* at 52a.

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[1] Pennsylvania's SOTP, developed by Julie C. Medelin, Ph.D., is widely used by corrections agencies nationwide. *See* www.medlintraining.com. DOC's Policy for Sex Offender Treatment, a part of its Access to Mental Health Care Procedures Manual, §13.8.1, is a part of the record before the lower court and is reproduced at Pet. App. 88a.

Respondent is serving a life sentence without the possibility of parole for the 1985 murder of Rose Marie Foley. Pet. App. 5a. Although he was not convicted of a sexual offense, his pre-sentence report indicated that when his victim's body was found, it was "clad only in a bra (which was unsnapped and pulled over the breasts), a blouse which was also above the breasts, and socks." *Id.* The autopsy found abrasions and contusions on the victim's genitals. *Id.* Respondent also admitted cutting away the skin around the victim's nipple to prevent law enforcement from identifying his bite marks. *Id.* at 5a-6a.

In 2003, respondent was recommended for assessment for SOTP. Pet. App. 6a-7a. The prison's Chief Psychologist determined that the recommendation was appropriate based on the "treatment team's evaluation of him coupled with the sexual component of [his] offense." *Id.* at 8a-9a. Respondent, however, has consistently objected to being assessed for SOTP and has refused to participate in SOTP because he was convicted of murder and not a sexual offense. *Id.* at 8a. Under SOTP, respondent and other inmates who refuse to be assessed are classified as being in the Moderate/High risk category for sexual offenders. *Id.* at 9a. Although respondent has not been disciplined for his failure to participate, he could potentially lose his prison job, be assigned to disciplinary custody for ninety days, have his right to receive visitors suspended, and lose access to television, radio and the commissary. *Id.* at 10a.

2. The respondent, asserting claims under the Fifth, Sixth, Eighth and Fourteenth Amendments, brought this action to prohibit petitioners from

requiring that he be assessed for and participate in SOTP. Pet. App. 4a-5a. Petitioners moved to dismiss for failure to state a claim. *Id.* at 11a. The District Court converted their motion to one for summary judgment, which was granted. *Id.* at 11a-12a.

Relying on this Court's decision in *McKune*, the District Court first rejected respondent's Fifth Amendment self-incrimination claim because, among other things, the consequences of his refusal to participate in the SOPT did not rise to the level of "compulsion." Pet. App. 12a. The District Court also rejected respondent's Fourteenth Amendment procedural due process claim since, *inter alia*, there was no evidence that he was forced to undergo involuntary treatment, being labeled a sex offender does not by itself create a liberty interest, and he did not have an independent free-standing liberty interest in not participating in SOTP which would require due process protections.[2] *Id.* at 13a.

3. A panel of the Court of Appeals reversed the District Court's determination that respondent did not have a liberty interest in not participating in SOTP.[3] Pet. App. 22a. In reaching its decision, it

[2] The District Court also granted summary judgment in favor of petitioners on respondent's Sixth, Eighth and Fourteenth Amendment equal protection claims as well. Pet. App. 13a. In addition, it denied respondent's request to file a third amended complaint. *Id.* at 13a-14a. These rulings are not relevant to the question presented in the petition.

[3] It affirmed the District Court's decision in all other respects, including its determination that respondent was not "compelled" to participate in SOTP for purposes of the Fifth Amendment. Pet. App. 49a.

"recognize[d] that prisons have a strong interest in enrolling their inmates in various rehabilitative programs and that prison administrators are in the best position to exercise discretion in administering those programs." *Id.* at 28a. Nonetheless, it held that "only after a prisoner has been afforded due process may sex offender conditions be imposed on an inmate who has not been convicted of a sexual offense." *Id.* at 18a. The required process would include (1) written notice; (2) a hearing; (3) disclosure of the evidence relied upon by prison officials; (4) the right to present witness testimony and conduct cross-examination; (5) an independent decision-maker; and (6) a written statement by the decision-maker explaining the evidence and reasoning for any classification of respondent which would require SOTP. *Id.* at 29a.

In *Vitek*, the Court held that the stigma of a state prisoner being labeled mentally ill together with being involuntarily transferred to a mental hospital implicated a liberty interest protected by the Due Process Clause. 445 U.S. at 487. The Court of Appeals expressly relied upon *Vitek* in finding that respondent had an independent due process liberty interest. Pet. App. 17a-18a. First, it found that classifying respondent "even as a possible sex offender is stigmatizing" in a manner similar to being labeled as mentally ill. *Id.* at 23a. Second, it found that SOTP, consisting of "weekly psychotherapy sessions for two years" is "sufficiently similar to the forced transfer to a mental institution" which was found to trigger a liberty interest in *Vitek*. Pet. App. 19a. The Court of Appeals concluded that "mandating [respondent's] participation in SOTP is not within the sentence imposed since he is incarcerated for committing murder in the first degree and not for committing a

sexual offense. . . . In turn, compelled treatment, i.e., sex offender therapy, changes the conditions of [respondent's] sentence and, accordingly, constitutes a loss of liberty that exceeds his loss of freedom from confinement." *Id.* at 19a-20a.

Despite finding that respondent's participation in SOTP was not "voluntary" for purposes of the Fourteenth Amendment, the Court of Appeals determined that respondent's participation was not "compelled" for purposes of the Fifth Amendment. Pet. App. 37a. Following this Court's decision in *McKune*, it found that the potential deprivations faced by respondent such as loss of his prison job, temporary assignment to disciplinary custody for ninety days, cell restriction for thirty days, and suspension of visitor privileges did not rise to the level of compulsion "which would compel [respondent] to expose himself to criminal liability" for purposes of the Fifth Amendment. *Id.* Moreover, the Court of Appeals specifically concluded that the consequences respondent faces here for not participating in SOTP are no greater than those which were at issue in *McKune*. Pet. App. 36a.

4. The Court of Appeals denied petitioners' request for panel rehearing and rehearing *en banc*. Pet. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Divided Over Whether – and Under What Circumstances – a Prisoner Has a Liberty Interest in Not Being Labeled a Sex Offender.

The Courts of Appeals have considered the question presented by this case on numerous occasions, but have been unable to reach a consensus. Rather, the courts have coalesced around two competing and irreconcilable views.

The Eleventh Circuit, now joined by the Third, holds that the stigma of being classified as a sex offender together with being required to participate in sex offender treatment implicates a liberty interest. *Kirby v. Siegelman*, 195 F.3d 1285, 1291 (11th Cir. 1999). The Fifth, Ninth and Tenth Circuits have adopted a modified position which recognizes a liberty interest in being labeled a sex offender, but only where parole or good time credits are conditioned on participation in sex offender treatment. *See Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004) (due process required where sex offender registration and therapy condition for parole); *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997) (same); and *Chambers v. Colorado Dep't of Corrections*, 205 F.3d 1237 (10th Cir. 2000) (due process required before being classified as sex offender where prisoner would lose good time credit).

The Seventh Circuit has taken the opposite approach and rejected the view that the stigma of being labeled a sex offender – even where it results in

the denial of parole – can create a liberty interest. *Grennier v. Frank*, 453 F.3d 442 (7th Cir. 2006) (stigma alone in being labeled a sex offender is insufficient to create a liberty or property interest). The Second Circuit, in a recent decision involving facts strikingly similar to those in the present case,[4] held that a prisoner did not have a liberty interest in not being assessed a "sexual offense treatment needs" score even though he had been acquitted of sexual assault. *Vega v. Lantz*, 596 F.3d 77 (2d Cir. 2010) (prisoner convicted of assault based on the cutting off of teenage girl's nipple which he then forced her to swallow). The Eighth Circuit, although not addressing the issue directly, has suggested that it agrees with the positions of the Seventh and Second Circuits. *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003) (holding that requiring an individual to register as a sexual offender even though he was not convicted of a sexual offense did not implicate a liberty interest).

This division among the courts of appeals has been widely recognized and shows no sign of resolving itself. *See, e.g., Vega*, 596 F.3d at 82 (discussing decisions from other courts of appeals); *Grennier*, 453 F.3d at 445 (same); *Coleman*, 395 F.3d at 223 fn. 26 (same). Petitioners have a substantial interest in providing SOTP and other similar treatment programs to prisoners as part of the rehabilitative process. The decision of the Court of Appeals burdens petitioners' ability to provide such programs in an

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[4] Respondent pled guilty to murder and was not convicted of sexually assaulting his victim. However, the crime was sexual in nature and he had attempted to cut away the skin around the victim's nipple to prevent law enforcement from identifying his bite marks. Pet. App. 5a-6a.

efficient and effective manner. The Court should take this opportunity to resolve the conflict among the Circuits by addressing the question raised in the petition which is of critical importance to the management of our nation's prisons.

II. This Case Presents Important and Recurrent Issues for Prison Administration on Which the Court Should Provide Guidance.

The Court of Appeals' decision has important implications for prison administration, involving both sex offenders specifically and rehabilitative programming generally. The Court, especially in light of the disarray among the circuits just discussed, should address these issues to provide needed guidance to the lower courts and to prison administrators.

Sex offenders pose a "serious threat in this Nation," *McKune*, 536 U.S. at 32, and in recent years government at all levels has devoted substantial attention to measures to protect society from the recidivism to which sex offenders are particularly prone. *See, e.g. U.S. v. Comstock*, ___ U.S. ___, 130 S. Ct. 1949 (2010) (civil commitment of violent sex offenders); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (same); *Selling v. Young*, 531 U.S. 250 (2001) (same); *Carr v. U.S.*, ___ U.S. ___, 130 S. Ct. 2229 (2010) (registration and community notification statute); *Smith v. Doe*, 538 U.S. 84 (2003) (same). In particular, the Court has noted the "vital penological purpose" served by in-prison rehabilitation programs, and their effectiveness in reducing sex offender recidivism. *McKune*, 536 U.S. at 29, 32-33. *McKune* and the other

cases cited all involved programs aimed at *convicted* sex offenders, *see, e.g.*, *id.* at 32-33, but the task faced by prison administrators, and the potential benefits of rehabilitative programs, cannot be so neatly cabined.

There are well over 150,000 prisoners in the United States who are designated as sex offenders based on their conviction for a sex offense,[5] and these prisoners represent the majority of those designated for sex offender treatment. However, there are a significant number of other prisoners who – like respondent – were not convicted of a sexual offense but whom prison officials believe would benefit from SOTP. Often, as here, this determination is based on the underlying circumstances of the crime, since even crimes with obvious sexual components may not be prosecuted as sex offenses.[6] Prison officials may also glean insights into a prisoner's rehabilitative needs from interviews, psychological testing and other criminal history information. Recommendations regarding other similar treatment programs such as those for drug and alcohol abuse, domestic abuse, anger management, and HIV/AIDS education are typically made in the same way: alcohol abuse programming, for example is not limited to those prisoners who have actually been convicted of an alcohol-related crime such as driving while intoxicated.

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[5] *See* Bureau of Justice Statistics, Bulletin, Prisoners in 2009 at 30, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2232.

[6] For a variety of reasons – including sparing the victims from further trauma – prosecutors may agree to plead down a sex offense such as rape to a more general crime such as assault; alternatively, as this case illustrates, prosecutors may elect to pursue only the most serious of the charges that might be brought.

Most, if not all, of these programs are aimed at what the Court of Appeals called "behavior modification," and most if not all could be described as "stigmatizing." The Court of Appeals' decision thus calls into question prison practices covering a wide array of rehabilitative programs. This Court has not previously addressed what, if any, due process protections apply in such situations, but it should do so now.

III. The Court Of Appeals' Decision Is Inconsistent With Decisions Of This Court.

A. The Court of Appeals wrongly extended the holdings in *Vitek v. Jones* and *Washington v. Harper* to treatment programs routinely provided within the general prison environment.

It is a truism that imprisonment following upon conviction of a crime "brings about the necessary withdrawal or limitation of many privileges and rights," *Sandin v. Conner*, 515 U.S. 472, 485 (1985) (citation and internal quotation marks omitted), including many aspects of the "liberty" that would otherwise be protected by the Due Process Clause. *Overton v. Bazzetta*, 529 U.S. 126, 131 (2003) ("[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner.") The primary responsibility for running prisons is entrusted to prison administrators, whose decisions on how best to achieve their rehabilitative and other goals is, within very broad limits, not subject to judicial scrutiny in the name of due process. *Id.*, at 132 (courts "must accord substantial deference to the professional

judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them").

"This is not to say that a valid conviction extinguishes every direct due process protection," *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); but even changes that have a "substantial adverse impact" on a prisoner do not implicate the Due Process Clause "[a]s long as the conditions or degree of confinement ... is within the sentence imposed upon him." *Montanye v. Haymes*, 427 U.S. 236, 242 (1976). The residual liberty interest enjoyed by a prisoner is invaded only where conditions of confinement are "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek v. Jones*, 445 U.S. 480, 493 (1980).[7]

In the thirty-plus years since *Vitek*, the Court has only twice held that its demanding standard was met. In *Vitek* itself, the Court held that the involuntary commitment of a prisoner to a mental hospital implicated a liberty interest to which due process protections attached, because such a commitment "is not within the range of conditions of confinement to which a prison sentence subjects an individual." *Id.*,

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[7] A similar, although less demanding, standard governs liberty interests created by state law. Those interests are generally limited to "freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ... nonetheless imposes *atypical and significant hardship* on the inmate in relation to the ordinary incidents of prison life. *Sandin*, 515 U.S. at 484 (citations omitted, emphasis added).

at 493. And in *Washington v. Harper*, 494 U.S. 210 (1990), the Court, relying on *Vitek*, held that the involuntary administration of antipsychotic drugs to a prisoner likewise implicated a protected liberty interest even in the absence of a transfer to a mental institution.[8] *Id.*, at 222-223. But nothing in *Vitek* or *Harper* justifies extending their holdings beyond the context in which they arose – the involuntary psychiatric treatment of mental illness – to the quite different context of the prison rehabilitative programs that are a routine feature of virtually all contemporary correctional systems.

In holding otherwise, the Court of Appeals relied heavily on the fact that the aim of the SOTP is "behavior modification," *see* Pet. App. 7a, 16a-17a, 21a-22a & 25a, a phrase that this Court likewise used to describe the psychiatric interventions to which the prisoner in *Vitek* was subject. *See id.*, 445 U.S. at 488, 492, 494. But this elastic phrase is little to the purpose. *Most* prison programs – from drug and alcohol abuse prevention, to anti-gang initiatives, to HIV/AIDS education, to anger management – seek some sort of "behavior modification," but they are not, for that reason alone, beyond "the range of conditions of confinement to which a prison sentence subjects an individual." Nor are they, for that reason alone, comparable to the conditions that the Court considered in *Vitek* or *Harper*.

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[8] In *Harper*, the prisoner was housed in a special unit for the treatment of mental illness within his prison. Although not committed to a separate mental hospital like the prisoner in *Vitek*, he was subjected to full-time psychiatric care, including the involuntary administration of antipsychotic medication. *Id.*, at 214-217.

In *Vitek*, the nature of the psychiatric interventions to which the prisoner could be involuntarily subjected was described in the District Court proceedings "only generally," but it is clear that they included "techniques of behavior modification *not used at the prison*," including the use of medication, *see Miller v. Vitek*, 437 F.Supp. 569, 573 & n. 8 (D.Neb. 1977) (emphasis added), a factor that was, of course, also present in *Harper*. The administration of antipsychotic medications is not only highly intrusive – their purpose, after all, is to "alter the chemical balance in a patient's brain," *Harper*, 494 U.S. at 229 – but can also have the "serious, even fatal side effects" that the Court described at length in *Harper*. *Id.*, at 229-230. In addition, commitment to a mental hospital separates a prisoner from the normal routine of prison life, defining his entire existence and precluding his participation in educational, vocational and other rehabilitative programs.

By contrast, SOTP is not highly intrusive and does not supplant the normal routine and expectations of prison life. Pennsylvania's SOTP meets for only 2 hours a week. The prisoner retains the ability to have a prison job, take educational and vocational classes, eat meals in the dining hall, make purchases at the prison commissary, and see visitors. Finally, the SOTP does not include the administration of any medication. Respondent's weekly participation in a couple of hours of group therapy is thus not "qualitatively different" from the conditions characteristically experienced by those serving a prison sentence. Certainly, it has little in common with the conditions considered in *Vitek* and *Harper*; and the Court of Appeals erred in equating it to the

involuntary commitment to a mental hospital or the involuntary administration of psychotropic medication.

B. The Court of Appeals' decision conflicts with *McKune v. Lile.*

In *McKune v. Lile*, 536 U.S. 24 (2002), the Court held that a prisoner's right against self-incrimination under the Fifth Amendment was not violated where he was required to participate in a prison sex offender program or lose certain privileges.[9] A majority of the Court, although unable to agree on a precise standard, held that the prisoner's participation in the program was not "compelled" within the meaning of the Fifth Amendment.[10] The deprivations faced by respondent for not participating in SOTP in this case are comparable to, and certainly no greater than, those faced by the prisoner in *McKune*.[11] Thus,

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[9] These privileges included visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, and access to a personal television. The prisoner was also moved to a maximum security unit. *McKune*, 536 U.S. at 30-31.

[10] A four-member plurality of the Court would have used the due process standard under *Sandin* to determine whether there was compulsion. *McKune*, 536 U.S. at 37-38. Justice O'Conner, concurring in the judgment, rejected that approach but did not articulate an alternative test. Rather, relying on other prior cases interpreting the Fifth Amendment, she simply concluded that the prisoner was not "compelled" as that term has been used by the Court. *Id.* at 48-51.

[11] Respondent has not in fact suffered any adverse consequences for his refusal to participate. In theory, he could be assigned to disciplinary custody for ninety days and lose certain privileges: his prison job, visitation rights, and access to television, radio and the commissary. Pet. App. 10a.

following *McKune*, the Court of Appeals correctly held that respondent's participation in the program was not "compelled" and he therefore could not prevail on his Fifth Amendment claim. Pet. App. 37a.

But the Court of Appeals nevertheless held that respondent's participation in the program was not "voluntary," Pet. App. 26a – and hence amounted to a "deprivation" for due process purposes – by relying on the same possible consequences that it held did *not* amount to "compulsion." *Compare* Pet. App. 26a with Pet. App. 35a-36a. The Court of Appeals made no attempt to explain this contradiction. Having concluded that respondent was not compelled to participate in SOTP in its Fifth Amendment analysis, it made no sense for the Court of Appeals to then conclude that the same potential deprivations were so onerous as to make respondent's decision involuntary for purposes of due process.

In *McKune*, a four member plurality of the Court, guided by *Sandin*, determined that the standard for what constitutes "compulsion" for purposes of the Fifth Amendment is the same as the standard for determining whether a due process right is implicated under the Fourteenth Amendment. *McKune*, 536 U.S. at 37-38. Justice O'Connor, while agreeing that there was no Fifth Amendment violation under the facts presented, maintained in her concurrence that the standard for what constitutes "compulsion" is *broader* under the Fifth Amendment than it is under the Fourteenth Amendment. *Id.* at 48-49 (O'Connor, J., concurring). The Court of Appeals, though, turned *McKune* on its head. Its decision relies on the premise that what constitutes "compulsion" is *narrower* for purposes of the Fifth Amendment than for purposes of

the Fourteenth Amendment: a proposition that *no* member of the *McKune* majority endorsed.

The Court's failure in *McKune* to adopt a single, unified approach to what constitutes compulsion for purposes of the Fifth Amendment perhaps contributed to the confusion of the Court of Appeals in this case. The Court should take this opportunity to reconcile the standard for finding a due process violation in *Sandin* with the standard of involuntariness under the Fifth Amendment in *McKune*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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DATE: January 26, 2011

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-3530

CHARLES S. RENCHENSKI,
Appellant

v.

THOMAS WILLIAMS; JOSEPH PIAZZA; PA DEPARTMENT OF CORRECTIONS; LARRY KASKIE, Unit Manager of E-Unit at SCI Coal Township; FRANK D. GILLIS, former Superintendent at SCI Coal Township; KANDIS K. DASCANI, Grievance Officer at SCI Coal Township; JOHN SIDLER, Licensed Psychologist Manager at SCI Coal Township; SHARON M. BURKS, Chief Grievance Officer in the Department of Corrections main office Camp Hill, Pa
Appellees

SUR PETITION FOR REHEARING EN BANC

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN,

GREENAWAY, VANASKIE, [1] ALDISERT and, ROTH, Circuit Judges

The Petition for Rehearing filed by the Appellees in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: October 28, 2010

cc: Howard G. Hopkirk Esq.
Jeffrey M. Theodore Esq.

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[1] Judge Alsidert and Judge Roth's votes are limited to panel rehearing only.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-3530

CHARLES S. RENCHENSKI,
Appellant

v.

THOMAS WILLIAMS, JOSEPH PIAZZA, PADEPARTMENT OF CORRECTIONS, LARRY KASKIE, Unit Manager of E-Unit at SCI Coal Township, FRANK D.GILLIS, former Superintendent at SCI Coal Township, KANDIS K. DASCANI, Grievance Officer at SCI Coal Township, JOHN SIDLER, Licensed Psychologist Manager at SCI Coal Township, SHARON M. BURKS, Chief Grievance Officer in the Department of Corrections main office Camp Hill, Pa

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On Appeal from the District Court for the Middle District of Pennsylvania
(No. 06-cv-278)
District Judge: Honorable Richard P. Conaboy

Argued July 12, 2010

Before: FUENTES, ALDISERT, and ROTH, Circuit Judges

(Opinion Filed: October 4, 2010)

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OPINION OF THE COURT

FUENTES, Circuit Judge:

Plaintiff Charles Renchenski is serving a life sentence without the possibility for parole for murder in the first degree. Although he was never charged with, nor convicted of, a sexual offense, in 2005 Defendants classified Renchenski as a sex offender and recommended his enrollment in Pennsylvania's Sex Offender Treatment Program ("SOTP"). Renchenski filed this 42 U.S.C. § 1983 action alleging that his forced participation in sex offender treatment therapy violates several constitutional rights, including his: Fourteenth Amendment right to due process before being labeled a sex offender; Fifth Amendment right against self-incrimination; and

Sixth Amendment right to have a jury adjudicate his guilt. He also challenges the District Court's conversion of Defendants' motion to dismiss into a summary judgment motion without granting him leave to take discovery. Because we hold that an inmate who has never been charged with, nor convicted of, a sex offense is entitled to due process before Pennsylvania classifies him as a sex offender, we reverse the District Court's Order entering summary judgment as to his procedural due process claim. We affirm the District Court in all other respects.

I.[1]

Renchenski is incarcerated at the State Correctional Institution at Coal Township, Pennsylvania ("SCI-CT"), serving a life sentence without the possibility of parole for his 1985 conviction of the murder-by-strangulation of Rose Marie Foley. Renchenski's Pre-Sentence Report ("PSR") indicated that Ms. Foley was found in an isolated rural area, and that "the body ... was clad only in a bra (which was unsnapped and pulled over the breasts), a blouse which was also above the breasts, and socks." (App. at 317.) An autopsy revealed multiple blunt force trauma to the face and trunk, and abrasions and contusions on Foley's genitals. Additionally, her right breast was mutilated. Under interrogation, Renchenski admitted that he had cut away the skin around the victim's nipple in

[1] Unless otherwise noted, the following facts are not in dispute and are derived from the District Court's opinion as well as the Joint Appendix ("App.").

an attempt to prevent law enforcement from identifying his bite-marks. Finally, the autopsy noted hemorrhages in the area of her clitoris and vulva.

While Renchenski was never charged with, or convicted of, sexually assaulting Foley, his PSR did indicate "sexual" as a "past or present problem area." (App. at 321.) Nevertheless, his original correctional plan did not designate sexual as an area of concern.[2] From 1990 through 1999, however, Renchenski's prescriptive correctional program plan was altered to indicate that sexual was an area of concern. When Pennsylvania adopted its state-wide sex offender treatment program in 1999, prison officials granted Renchenski's request that this determination be removed from his correctional plan.[3] This status quo remained in place until 2003, when Renchenski was transferred to SCI-CT.

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[2] At the time Renchenski was committed to the DOC's custody, Pennsylvania had not adopted a standardized SOTP.

[3] Title 42 of the Pennsylvania Code, effective January 21, 2003, sets forth a judge's sentencing authority vis-à-vis sexual offenders. It provides, in relevant part, that:

> A person, including an offender designated as a "sexually violent predator" . . . shall attend and participate in a Department of Corrections program of counseling or therapy designed for incarcerated sex offenders if the person is incarcerated in a State institution for any of the following provisions under [Title 18].

42 Pa. Cons. Stat. § 9718.1(a). In other words, this statute mandates behavioral modification for sex offenders. Subsection(c) of this statute delegates to the DOC the authority to "develop and provide the program of counseling or therapy for offenders."

Renchenski contends that after being transferred to SCI-CT, he complained to Defendant Williams, a prison counselor, about his loss of single-cell status. When his complaints went unanswered, Renchenski called Williams "slothful." Renchenski alleges that, in retaliation for this insult, Williams classified him as a sex offender and enrolled him in a slew of prison programs, including sex offender orientation, sex offender core, and sex offender maintenance.

Pennsylvania's SOTP is entitled "*Responsible Living: A Sex Offender Treatment Program*" and consists of a seven-phase behavioral modification course. Section 11(B) of the DOC's Policy Statement on Access to Mental Health Care ("Policy13.8.1") governs "risk/need assessment" and outlines how the DOC evaluates sex offenders. It does not delineate how the DOC determines whether or not an inmate is a sex offender. *Id.* After the initial assessment, the treatment provider recommends a final risk level based on, among other things, the risk of recidivism, the attitude the inmate displays regarding sexual crimes, and any indication that the offender has a primary sexual attraction to children. *Id.* For prisoners assessed as moderate-to-high-risk offenders, the seven-step SOTP consists of one weekly two-hour group therapy session comprised of no more than fifteen participants that continues for approximately two years. *See* Policy 13.8.1 § 11(C)(2)(f). Throughout an inmate's involvement in the program, he or she can accumulate points for attendance, participation, and for completing homework assignments and major projects. An inmate "must accrue 85% of the total possible points in order to 'graduate' from the program." *Id.* While an inmate who denies a past history of sexual violence may initially participate in

treatment, if he or she persists in maintaining his or her innocence, the inmate will be dismissed from the program.

The SOTP is run by qualified professionals. In order to serve as a credentialed treatment provider, a staff member must have a graduate degree in behavioral health or social sciences and at least two years of experience with sex offender treatment. Alternatively, a staff member may be credentialed if he or she has an undergraduate degree in behavioral health and at least 2,000 hours of clinical sex offender treatment. The SOTP is supervised by a Licensed Psychologist Manager.

Renchenski contested his sex offender designation, and his complaint was referred to John Sidler, SCI-CT's Chief Psychologist. Sidler dismissed his complaint, because "based on the official version of the offense, there [was] a high level of sexual content involved. [Therefore, t]he Psychology Department supports . . . [the] decision to add sexual offender status." (App. at 84.) Sidler noted that a correctional plan, which is developed for each inmate, is designed to address an inmate's individual needs to prevent recidivism and to ensure smooth transition back into society. Sidler indicated that he approved of Renchenski's designation as a sex offender because "[t]he official version of the crime indicate[d] that there was a sexual component to the crime, as Renchenski was engaged in sexual act with the victim when the homicide occurred." (*Id.* at 286.) Sidler also stated that the "decision to recommend Renchenski for sex offender programs was based upon the[t]reatment team's evaluation of him coupled with the sexual component of Renchenski's offense." (*Id.* at

287.)

While Defendants claim that Renchenski's name currently appears on the institutional sex offender roster as a "possible sex offender," they maintain that he has not been classified as a sex offender because he has refused to submit to an assessment. (*Id.* at 289.) This assertion contradicts DOC's own policy, which provides that "[e]very inmate who refuses assessment and/or treatment shall be identified as falling in the Moderate/High risk category [of sex offender]." Policy 13.8.1§ 11(B)(4)(g). Moreover, Defendants' argument that Williams merely recommended to the Psychology Department that Renchenski be assessed to determine whether or not he needed sex offender treatment is unsupported by the record, which reveals that Williams recommended Renchenski participate in three specific sex offender programs: orientation, core and maintenance. *Id.* at 15; (App. at 265, 475.) Defendants also admit that, under the current SOTP, at the time the DOC commences a new treatment group, Renchenski would be assessed for risk level and not for whether or not he needs treatment. *See* Appellee's Br. at 15.[4]

Defendants also contend that while "the recommended programming may be a requirement of an inmate's correctional plan, an inmate's

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[4] In 2005 Renchenski was informed that SCI-CT was starting a new sex offender group which permitted enrollment of inmates who, like him, had in the past denied committing sex offenses. Even though attendance at the SOTP is a requirement of Renchenski's correctional plan, he refused to participate and therefore was never "assessed."

participation in the specific program is voluntary." *Id.* at 10. This claim is also belied by the record. For example, Policy 13.8.1 § 119(C)(1)(h) and (i) mandates that sex offenders participate in treatment by using the phrase "shall receive all seven phases" of therapy. Furthermore, in response to Renchenski's grievance, Larry Kaskie, the Unit Manager, noted that if the Psychology Department determines he needs counseling, he will be required to submit to the program. (App. at 475.) In a subsequent correspondence, John Castrignano, a Psychological Services Specialist, informed Renchenski that "Participation in Sex Offender Programming is required as part of your Correctional Plan[.]" (*Id.* at 458.) (emphasis in original); *see also* (*Id.* at 454 [August 19, 2003 Letter from Superintendent Gillis to Renchenski indicating that it was in his "best interest to comply" with treatment.]). And while Renchenski concedes that his refusal to participate has no effect on his parole status, he notes that his protests nonetheless subject him to substantial penalties, including the loss of his prison job, assignment to disciplinary custody for ninety days, cell restriction for thirty days, suspension of the right to receive visitors, and loss of privileges such as access to television, radio and the commissary. Appellant's Reply Br. at 2; *see* DC-ADM, 801, Inmate Discipline Procedures Manual § 4.

1. Procedural History

Renchenski filed the instant action, pro se, alleging several constitutional violations.[5] Defendants filed a motion to dismiss Renchenski's amended complaint for failure to state a claim, which Renchenski opposed. The magistrate judge issued a Report and Recommendation, urging that dismissal was appropriate. Following the receipt of Renchenski's objections to the Report and Recommendation, and Defendants' opposing brief, the District Court ordered Defendants to file a supplemental brief addressing: (1) whether Renchenski was currently under consideration for participation in the SOTP; (2)the process for making such a determination; and (3) what, if any, ramifications Renchenski faced for refusing to participate in therapy. (App. at 5-6.)

After reviewing Defendants' Supplemental Brief, the District Court issued an Order notifying the parties of its intent to convert the motion to dismiss into a motion for summary judgment. While the District Court's Order was electronically docketed, it is unclear if a hard copy was sent to Renchenski via the United States Postal Service or whether he actually received this notice. What is clear is that Renchenski did not file a Rule 56(f) affidavit seeking to delay disposition of the summary judgment motion while he gathered evidence in support of his opposition motion. Instead, he sought leave to file a

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[5] Individually named Defendants include Thomas Williams, a prison counselor; Joseph Piazza, Prison Superintendent; Larry Kaskie, Unit Manager; Frank Gillis, former Superintendent; Kandis Dascani, Grievance Officer; John Sidler, Psychologist; and Sharon Burks, Chief Grievance Officer.

third amended complaint. In its Order and accompanying opinion, the District Court denied Renchenski's motion to file a third amended complaint and granted summary judgment in Defendants' favor on all counts.

2. The District Court's Ruling

The District Court first rejected Renchenski's claim that because the SOTP required him to admit to past sexual crimes, including the sexual component of the 1982 murder, participation violated his Fifth Amendment right against self-incrimination. The District Court properly considered this claim in light of the Supreme Court's holding in *McKune v. Lile*,536 U.S. 24 (2002), which stressed that "compulsion" was the key inquiry in any Fifth Amendment claim.[6] The District Court reasoned that: (1) Pennsylvania's SOTP bore a rational relationship to the legitimate penological objective of assessing and rehabilitating inmates whose records indicate a potential problem of a sexual nature; (2) the only consequence flowing from non-participation in the program—being labeled a "possible sex offender" on an internal prison roster—does not rise to the level of compulsion; and (3) being labeled a possible sex offender does not constitute an atypical and significant hardship in relation to the ordinary incidents of prison life.

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[6] "[T]he central question becomes whether the State's program, and the consequences for nonparticipation in it, combine to create a compulsion that encumbers the constitutional right. If there is compulsion, the State cannot continue the program in its present form . . . ." 536 U.S. at 35.

Next, the District Court granted summary judgment in Defendants' favor on Renchenski's Fourteenth Amendment procedural due process claim. First, the District Court noted that Renchenski presented no evidence that he was forced to undergo involuntary treatment. Alternatively, the District Court held that Renchenski had neither an independent liberty interest, nor a state-created liberty interest, which triggered the need for due process protections. Because Renchenski is serving a life sentence without the possibility of parole, the District Court reasoned that refusing to participate in the SOTP would have no tangible effect on his liberty. It also rejected his argument that the stigma attached to merely labeling a prisoner a sex offender gave rise to a liberty interest.

The District Court next disposed of Renchenski's Equal Protection Clause, Sixth Amendment, and Eighth Amendment claims. First, the District Court ruled that Renchenski's equal protection claim failed because his allegations were vague and conclusory. Similarly, the District Court held that Renchenski could not sustain his Sixth Amendment claim because the provisions of Pennsylvania's code he cited to— 42 Pa. Cons. Stat. § 9791 *et seq.*— related to the sex offender registration laws and not to the issues raised in his complaint. Next, the District Court rejected Renchenski's Eighth Amendment claim, holding that while a cruel and unusual punishment claim may be predicated on emotional injury, Renchenski failed to establish that Defendants were aware that a substantial risk of serious harm existed and deliberately disregarded that risk. Accordingly, the District Court granted summary judgment in Defendants' favor on all counts and denied

Renchenski's motion for leave to file a third amended complaint.[7] Renchenski filed a pro se appeal, and we appointed pro bono counsel.

II.

The District Court exercised jurisdiction over Renchenski's claims under 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's disposition of a summary judgment motion de novo. *See Fed. Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 443 (3d Cir. 2003). "We apply the same standard as the District Court: Summary judgment is appropriate only where, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Melrose Inc. v. City of Pittsburgh*, --- F.3d ----, 2010WL 2814284, at *5 (3d Cir. 2010) (citation & internal quotation marks omitted). "The mere existence of some evidence in support of the nonmovant is insufficient to deny a motion for summary judgment; enough evidence must exist to enable a jury to reasonably find for the nonmovant on the issue." *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009) (citation omitted). We review a district court decision refusing leave to amend a complaint

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[7] Having disposed of the claims addressed in the Report and Recommendation, the District Court then stated its reasons for denying Renchenski's motion to file a third amended complaint. The Court concluded that amendment would be futile since the Ex Post Facto Clause claim Renchenski sought to add was meritless because participation in SOTP would not disadvantage him, and because participation in the program would not affect the legal consequences of his crime of conviction.

pursuant to Federal Rule of Civil Procedure 15(a) for abuse of discretion. *See Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263, 266 (3d Cir. 2008).

III.

Renchenski raises several substantive challenges and one procedural challenge to the District Court's grant of summary judgment in Defendants' favor. We consider each in turn.

1. Constitutional Challenges

a. Due Process Clause Claim

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. A court reviewing a procedural due process claim first determines whether the plaintiff asserts an interest protected by the Fourteenth Amendment. *See Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000). If the court concludes that such an interest exists, the next issue is whether the procedures provided to the plaintiff afforded that individual due process of law. *Id.*

i. Identifiable Liberty Interest

While an inmate's constitutional rights are diminished in prison, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Nonetheless, a convicted criminal's liberty interest is subject to "the nature of the regime to which [(s)he has] been lawfully committed." *Id.* at 556.

"Among the historic liberties protected by the Due Process Clause is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (internal quotations & citation omitted). Nevertheless, "changes in the conditions of confinement having a substantial adverse impact on [a] prisoner are not alone sufficient to invoke the protections of the Due Process Clause as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Id.* at 493 (internal quotations & alteration omitted).

A prisoner may be deprived of a liberty interest in violation of the Constitution in two ways: (1) when severe changes in conditions of confinement amount to a grievous loss that should not be imposed without the opportunity for notice and an adequate hearing, *id.* at 488; and (2) when state statutes and regulations create a liberty interest in freedom from restraint that imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life[,]" thereby triggering due process protection, *Sandin v. Conner*, 515 U.S.472, 484 (1995); *see also Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). The first is the so-called independent due process liberty interest, while the latter is the so-called state-created liberty interest.

Renchenski argues that the stigmatizing consequences of being labeled a sex offender, when coupled with mandated behavioral modification therapy, constitutes the kind of deprivation of liberty that requires procedural protections. Renchenski contends that although his conviction extinguished

his right to be free from confinement, it did not authorize Pennsylvania to classify him as a sex offender without affording him additional process.

In evaluating Renchenski's argument, we are guided by the Supreme Court's decision in *Vitek*, in which the Court held that the "involuntary transfer of a . . . state prisoner [convicted of robbery] to a mental hospital implicate[d] a liberty interest that is protected by the Due Process Clause." 445 U.S. at 487. While the Court based this holding, in part, on a state-created liberty interest, it also held that the prisoner's liberty interest existed separate and apart from the state regulation. Specifically, the Court noted that the stigmatizing characterization of the prisoner as mentally ill, when coupled with the transfer to an asylum to participate in mandatory behavioral therapy, "constituted a major change in the conditions of confinement amounting to a grievous loss that should not be imposed without the opportunity for notice and an adequate hearing." *Id.* at 488 (quotation marks omitted); *compare Washington v. Harper*, 494 U.S. 210 (1990) (holding that a prisoner had an independent liberty interest in being freeform the arbitrary administration of psychotropic drugs), *with Meachum*, 427 U.S. at 224 (holding that the Due Process Clause does not independently create a liberty interest in prisoners to be free from intrastate prison transfers). The Court reasoned that despite the prisoner's conviction for robbery, he still "retained a residuum of liberty that would be infringed . . . without complying with minimum requirements of due process." *Vitek*, 445 U.S. at 491. In turn, the Court concluded that transfer to a mental institution was "'qualitatively different' from the punishment characteristically suffered by a person convicted of

crime, and had 'stigmatizing consequences." *Sandin*, 515 U.S. at 479 n.4 (citing *Vitek*, 445 U.S. at 493-94) (quotation marks omitted). Thus, when determining an inmate's due process right "to be free from . . . unjustified intrusions on personal security[,]" *Vitek* instructs courts to consider "[c]ompelled treatment in the form of mandatory behavior modification programs[.]" 445 U.S. at 492.

Relying on *Vitek*, Renchenski argues that the District Court erred in not recognizing that the Due Process Clause independently conferred upon him a liberty interest in not being classified as a sex offender—which he argues is even more stigmatizing than being labeled as mentally ill—and forced into sex offender treatment without due process.[8] We agree that only after a prisoner has been afforded due process may sex offender conditions be imposed on an inmate who has not been convicted of a sexual offense.

It is largely without question—and Defendants do not claim otherwise—that the sex offender label severely stigmatizes an individual, and that a prisoner labeled as a sex offender faces unique challenges in the prison environment. Renchenski cites to numerous sociological and criminal justice studies which conclude that sex offenders are considered "an anathema in the inmate subculture . . . [and] inmate norms call for their savage beating." Appellant's Br. at 9 (citing James E.Robertson, Sex Offenders and the Criminal Justice System 83-87

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[8] Even though Pennsylvania's SOTP is based on a statute and DOC regulations, Renchenski does not argue that his due process claim stems from a state-created liberty interest.

(1994)). Sexual offender inmates are also ready targets for sexual violence in prison. Indeed, studies suggest that sexual offenders' rate of sexual abuse in prison ranges from 34% to 50% higher than that of the general prison population. Appellant's Br. at 10 (citing Nancy Wolff et al., *Understanding Sexual Victimization Inside Prisons: Factors that Predict Risk*, 6 Criminology and Pub. Pol'y 535, 549 (2007)). The Ninth Circuit has stated that "[w]e can hardly conceive of a state's action bearing more stigmatizing consequences than the labeling of a prison inmate as a sex offender." *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (internal quotation marks omitted); *see also Coleman v. Dretke*, 409 F.3d 665, 668 (5th Cir. 2005) (noting that when a state labeled an individual as a sex offender, it "strongly implied" that the identified individual had committed a sex offense, "which can undoubtedly cause adverse social consequences") (internal quotation marks omitted); *Chambers v. Colorado Dep't of Corr.*, 205 F.3d 1237,1242 (10th Cir. 2000) (noting that the sex offender label is "replete with inchoate stigmatization"). Accordingly, we agree with Renchenski that classifying him as a moderate/high risk sex offender—or even as a possible sex offender—is stigmatizing.

We also believe that the SOTP seven-step program, which consists of weekly psychotherapy sessions for approximately two years, is sufficiently similar to the forced transfer to a mental institution that the Supreme Court determined triggered a liberty interest in *Vitek*. Just as the Supreme Court reasoned that being confined to a mental institution was not within the sentence imposed on the prisoner in *Vitek*, who was incarcerated and being punished for robbery, mandating Renchenski's participation in

SOTP is not within the sentence imposed since he is incarcerated for committing murder in the first degree and not for committing a sexual offense. In other words, because Renchenski was convicted of murder and his punishment is predicated upon that conviction, sex offender treatment is not one of the conditions of confinement that his sentence imposes upon him. In turn, compelled treatment, i.e., sex offender therapy, changes the conditions of Renchenski's sentence and, accordingly, constitutes a loss of liberty that exceeds his loss of freedom from confinement. *See Vitek*, 445 U.S. at 492.

We agree with the Eleventh and Fifth Circuits, which have held that labeling a prisoner a sex offender and forcing him or her to submit to intensive therapy triggers a liberty interest. For example, in *Kirby v. Siegelman* the Eleventh Circuit held that Alabama's classification of inmate Edmond as a sex offender implicated a liberty interest under the Due Process Clause, and it remanded to the district court to determine whether the procedures afforded by the state satisfied the Fourteenth Amendment's requirements. 195 F.3d 1285, 1287, 1290 (11th Cir. 1999). Edmond was serving a twenty-year sentence for attempted murder, and the state classified him as a sex offender based on two prior sex-related crimes listed in his PSR. *Id.* at 1288. Edmond was not convicted of either sex crime. In fact, the grand jury did not return a true bill for the charge of rape upon which Alabama relied. *Id.* Once classified as a sex offender, Edmond was required to participate in group therapy sessions in order to be eligible for parole. *Id.*

The Eleventh Circuit concluded that the Due Process Clause gave rise to an independent liberty

interest in not being labeled a sex offender and that "[a]n inmate who has never been convicted of a sex crime is entitled to due process before the state declares him to be a sex offender." *Id.* at 1292. It reasoned that branding Edmond a sex offender and forcing him to participate in behavioral modification therapy constituted a change in his confinement so severe that it exceeded the sentence imposed by the trial court. *Id.* at 1291. While the Eleventh Circuit briefly mentioned that Edmond's refusal to participate in the therapy program affected his eligibility for parole, the court did not indicate that this fact was dispositive. Rather, the Eleventh Circuit focused on the stigma associated with being labeled a sex offender, which, when coupled with mandatory therapy, was sufficiently similar to *Vitek* to trigger due process protection. *Id.* at 1292.

Similarly, in *Coleman v. Dretke*, the Fifth Circuit held that requiring a prisoner to register as a sex offender and participate in therapy as a condition of supervised release triggered a liberty interest. 395 F.3d 216, 222-23 (5th Cir. 2004)(rehearing en banc denied). While on parole for burglary, Coleman was indicted for aggravated sexual assault of a minor, but pleaded guilty to misdemeanor assault. The parole panel required him to register as a sex offender and participate in behavioral modification as part of his supervised release. He was never given notice of an opportunity to contest these conditions, and when he failed to participate in therapy, his parole was revoked.

The Fifth Circuit agreed with the Eleventh Circuit in *Kirby*, and relying on *Vitek*, held that "prisoners who have not been convicted of a sex offense have a liberty

interest created by the Due Process Clause in freedom from sex offender classification and conditions." *Id.* at 222. The court noted that in addition to the extreme stigmatization associated with being labeled a sex offender, the "state's sex offender therapy, involving intrusive and invasive behavioral modification techniques[,] is analogous to the treatment provided for in *Vitek*." *Id.* at 223. Therefore, while conceding that parolees often are required to participate in "some form of counseling ... as a condition on their release . . . due to its highly invasive nature, [the SOTP] is qualitatively different from other conditions which may attend an inmate's release." *Id.* (quotation marks omitted). Therefore, the court ruled that Coleman's liberty interest triggered procedural due process protections.

We agree with this analysis and join the Fifth and Eleventh Circuits in holding that the stigmatizing effects of being labeled a sex offender, when coupled with mandatory behavioral modification therapy, triggers an independent liberty interest emanating from the Due Process Clause of the Fourteenth Amendment.

Defendants' arguments to the contrary are unpersuasive. First, Defendants contend, and the District Court agreed, that Renchenski has not been labeled as a sex offender, but rather has been designated a "possible sex offender" whom DOC has recommended be assessed to determine whether he would benefit from participation in the SOTP. This assessment, Defendants claim, is routine and a necessary part of the rehabilitative process and prison

management.[9] This argument is unconvincing for several reasons. First, Defendants cite to no evidence in the record (such as the institutional sex offender's roster which they did not include in the joint appendix) supporting their assertion that Renchenski was labeled merely as a possible sex offender. Renchenski, on the other hand, notes that DOC classified him as a "mod/high" Sex Offender. (App. at 323.) Indeed, a letter from Sidler responding to Renchenski's grievance signals DOC's intention to add sex offender status to his correctional plan. (*Id.* at 84, 92.) In any event, we discern no difference for stigmatization purposes between being labeled a sex offender and being labeled a possible sex offender.

Moreover, Defendants' assertion that the assessment Renchenski must submit to is routine and part of the rehabilitative process is belied by the DOC's own regulations. Policy 13.8.1 § 11, which, as noted, governs inmates' behavioral health care, describes the assessment process in detail. A review of this section indicates that the assessment does not determine whether or not an inmate should be classified as a sex offender—the very process Renchenski claims he is entitled to. Rather, the assessment is a tool used to ascertain the level of sex

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[9] Defendants also argue that Renchenski's claim of stigmatization falls short because he has introduced no evidence in opposition to their motion for summary judgment demonstrating that the population at SCI-CT is aware of his status or that SCI-CT has publicized the issue. This argument is belied by the fact that the weekly therapy sessions are group therapy sessions, which comprise as many as fifteen inmates. If Renchenski were forced to participate, his categorization as a sex offender would surely be known to the prison population.

offender risk associated with each inmate in order to decide which therapy group (moderate/high or moderate/low) is most appropriate for the prisoner and to determine the risk of threat to the community. *See* Policy 13.8.1 § 11(C)(1)(c). The regulations do not indicate that a possible outcome of the assessment is a determination that the inmate should not participate in SOTP at all. Thus, once at the assessment stage, the stigma of sex offender status has already attached to the inmate.

Next, Defendants contend that because the assessment is routine, it does not constitute a significant or atypical hardship in the context of ordinary prison life. If Renchenski were convicted sex offender, this statement would ring true since Pennsylvania law requires a sex offender to participate in treatment as part of normal prison life. *See* 42 Pa. Cons. Stat. §9718. In other words, in Pennsylvania a convicted sex offender's punishment includes participation in sex offender therapy. Here, however, Renchenski is a convicted murderer and there is no evidence suggesting that sex offender treatment is part of the punishment imposed on convicted murderers in Pennsylvania. Nor did Defendants offer evidence suggesting that all prisoners, regardless of their offense of conviction, are assessed to determine their level of sex offender risk and the appropriate sex offender treatment group. In any event, Defendants conflate the independent due process liberty interest test with the significant and atypical hardship test, which is utilized to determine whether a state-created liberty interest exists. *See Sandin*, 515 U.S. at 483-84 ("States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these

interests will be generally limited to . . . not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . [as opposed to a state-created liberty interest which] imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." (internal citations & quotation marks omitted)). Here, Renchenski argues that his claimed liberty interest is protected by the Due Process Clause itself, which requires a showing of a severe change in conditions of confinement. Thus, whether sex offender treatment therapy is routine within Pennsylvania's prisons is immaterial.

Perhaps recognizing the fault in relying on the significant and atypical hardship standard, Defendants also argue that Renchenski has failed to highlight any significant change in his conditions of confinement. They contend that participation in the SOTP would consume only a small fraction of his time in prison and therefore that the treatment is dissimilar to *Vitek*, where the inmate was physically removed to a mental institution. This argument misses the mark. While the Supreme Court in *Vitek* was certainly concerned over the physical transfer of the prisoner, they emphasized their concern was with "[c]ompelled treatment in the form of behavioral modification programs." 445 U.S. at 492. Seizing on this language, at least two of our sister circuits have also focused on the intrusive nature of behavioral modification and neither the Fifth or Eleventh Circuits required any sort of physical transfer as a prerequisite for finding a liberty interest. *See e.g.*, *Coleman*, 395 F.3d at 222-23; *Kirby*, 195 F.3d at 1292; *Neal v. Shimoda*, 131 F.3d 818, 828 (9th Cir. 1997). Therefore, while a physical transfer may be sufficient

to constitute a change in a prisoner's confinement, *Vitek*, *Coleman* and *Kirby* do not stand for the proposition that a transfer is necessary for such a finding.

Defendants next argue that Renchenski's participation in the SOTP is "voluntary" and markedly different from *Vitek*, where the plaintiff was transferred to a mental hospital. We disagree. This argument is belied by the fact that according to DOC policy refusing to submit to an assessment earns Renchenski the label of a "mod/high" sex offender. In other words, if Renchenski refuses to participate, he will face the very stigmatization of being labeled a sex offender that he claims triggers constitutional protection. Additionally, prison regulations indicate that Renchenski will face punishments for refusing to participate.

Moreover, we find no material difference between an inmate refusing to participate in sex offender treatment and a prisoner seeking to forestall transfer to avoid participation in mental health therapy. Unless both plaintiffs are physically dragged to therapy, both "voluntarily" refuse to participate. Furthermore, there is nothing in the Supreme Court's decision in *Vitek* indicating that the mandatory nature of the treatment at the state-run mental hospital was any different than the mandatory nature of the SOTP to which Renchenski is subject.

Likewise, while the Eleventh Circuit in *Kirby* noted that the plaintiff's refusal to participate in the SOTP impacted his eligibility for parole, that opinion focused and was predicated on stigma combined with compelled therapy. And while the Fifth Circuit in

Coleman also noted the effect non-participation had on the plaintiff's parole, the court rejected the notion that the prisoner enjoyed a state-created liberty interest and focused instead on the stigma and intrusive nature of behavioral modification therapy. *But see Neal*, 131 F.3d at 827-29 (holding in the state-created liberty interest context that while participation in Hawaii's sex offender therapy was technically voluntary, because refusing to participate rendered an inmate completely ineligible for parole, the "coercive component of the SOTP [was] functionally equivalent to the psychiatric treatment required by the statute at issue in *Vitek*"). The Fifth Circuit went even further and distinguished sex offender treatment from other therapy programs offered and mandated by Texas' prisons because of the highly stigmatizing and intrusive nature of sex offender therapy. 395 F.3d at 224.

The Seventh Circuit's decision in *Grennier v. Frank*, 453F.3d 442 (7th Cir. 2006) does not alter this analysis. In *Grennier*, the court held that the stigmatization of being called a sex offender and being denied parole on that basis does not implicate due process. *Grennier* does not inform our decision since it involved a claim of a state-created liberty interest, which Renchenski does not assert is the basis for his liberty interest. Additionally, we disagree with the Seventh Circuit's interpretations of *Kirby* and *Coleman* as being predicated solely upon the fact that prisoners must participate in the SOTP in order to be eligible for parole. Unlike in *Neal*, where eligibility for parole was a dispositive factor, the Fifth and Eleventh Circuits' decisions were grounded in stigmatization coupled with "some other tangible element", i.e., mandated sex offender treatment therapy. *See*

Coleman, 395 F.3d at 223 n.26.

We recognize that prisons have a strong interest in enrolling their inmates in various rehabilitative programs and that prison administrators are in the best position to exercise discretion in administering those programs. We agree with Renchenski, however, that he has an independent liberty interest in not being labeled a sex offender, which results in mandatory sex offender therapy as part of a prescriptive correctional plan. The Fourteenth Amendment therefore entitles Renchenski to adequate process before Defendants can take this action.

ii. Adequate Procedure

Having determined that Renchenski has a due process liberty interest in not being labeled a sex offender and forced into treatment, we turn to what process will satisfy the Fourteenth Amendment. "When protected interests are implicated, the right to some kind of prior hearing is paramount.... [A] weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process." *Neal*, 131 F.3d at 830 (quoting *Bd. Of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972)) (emphasis omitted). Because Renchenski was never charged with, nor convicted of, a sex offense, the procedure he was afforded during his trial and conviction for the1982 murder cannot serve as the sufficient procedural safeguard for Fourteenth Amendment purposes. Nor has he been afforded the opportunity to properly challenge his sex offender classification. *See Coleman*, 395 F.3d at 221.

Given Renchenski's first degree murder conviction and the strong State interest in administering rehabilitative programs and maintaining order within the prison, however, Defendants need not commence "a new adversary criminal trial" before labeling Renchenski a sex offender and recommending him for therapy. *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972). Rather, the Fourteenth Amendment entitles him to minimum procedures which will result in "an effective but informal hearing." *Id.* at 485. These include: (1) written notice to Renchenski that Defendants are considering classifying him as a sex offender and mandating his participation in SOTP; (2) a hearing, held sufficiently after the notice to permit Renchenski to prepare, which includes: disclosure of the evidence Defendants would rely upon for the classification, and an opportunity for Renchenski to be heard in person and to present documentary evidence; (3) an opportunity to present witness testimony and to confront and cross-examine witnesses called by Defendants, "except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination"; (4) administration of the hearing by an independent decisionmaker; (5) rendering of a written statement by the decisionmaker as to the evidence relied on and the reasons for Renchenski's classification; and (6) "[e]ffective and timely notice of all the foregoing rights." *Vitek*, 445 U.S. at 494-95 (citation omitted).[10] "[T]he process should be flexible enough to consider evidence including letters, affidavits, and other

[10] We do not hold that due process requires the State to appoint Renchenski counsel at this hearing.

material that would not be admissible in an adversary criminal trial." *Morrissey*, 408 U.S. at 489.

For the foregoing reasons, we reverse the District Court's grant of summary judgment in Defendants' favor and remand this case to the District Court for further proceedings consistent with this opinion.[11]

b. Fifth Amendment Claim

Assuming, *arguendo*, that after a constitutionally sound administrative hearing Defendants determine he is subject to sex offender treatment, Renchenski claims that dubbing him a sex offender and mandating participation in the SOTP would violate his Fifth Amendment right against self-incrimination. The Fifth Amendment, incorporated and made applicable to the states through the Fourteenth Amendment, prevents a state from compelling a person to incriminate himself or herself. U.S.Const. amend. V (providing that no person "shall be compelled in any criminal case to be a witness against himself"). While the "privilege against self-incrimination does not terminate at the jailhouse door . . . [a] broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have

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[11] The District Court did not address, and the parties did not raise in their appellate briefs, issues of qualified immunity or the appropriateness of monetary damages. Nor was the important question of the allocation of the burden of persuasion, or the extent of Defendants' evidentiary burden, adequately presented to the District Court. *See E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997). We express no opinion on these issues and trust that the District Court will address them on remand.

suffered a lawful conviction." *McKune v. Lile*, 536 U.S. 24, 36 (2002). The Fifth Amendment right against self-incrimination applies not only in criminal trials, but whenever the state seeks to compel an individual to be a witness against himself or herself and divulge information that might incriminate that person in future criminal proceedings. *See Minnesota v. Murphy*, 465 U.S. 420, 426(1984).

The Supreme Court outlined the contours of a prisoner's Fifth Amendment right against self-incrimination in *McKune*, which involved a convicted sex offender's challenge to Kansas' compulsory sex offender program and required him to admit his crime of incarceration, as well as any other past sex crimes. 536 U.S. at 29. The information revealed by a prisoner during the sexual abuse treatment program was not privileged, Kansas reserved the right to use that information in future criminal proceedings, and it tested the veracity of the prisoner's admissions with a polygraph. *Id.* at 30. Lile, the state prisoner-plaintiff, was informed that if he refused to participate in treatment, his privilege status would be reduced from Level III to Level I, resulting in the curtailment of his visitation rights, earnings, work opportunities, ability to send money to his family, and other privileges. *Id.* at 31. Lile would also be transferred to a maximum-security prison where his movement would be limited, where he would be placed in a four-person (instead of a two-person) cell, and where he would be surrounded by more dangerous criminals. *Id.* Lile filed a Fifth Amendment challenge to the compulsory sex offender therapy based on the fact that incriminating statements made during counseling were not privileged. Lile also argued that the purported punishments he faced if he refused to participate were

sufficiently coercive as to constitute a violation of the right against self-incrimination.

A plurality of the Supreme Court rejected this argument. Before finding it necessary to address the issues of privilege and immunity that Lile asserted rendered his participation in the sex offender therapy program a Fifth Amendment violation, the Court instructed that compulsion was the linchpin, since the initial and "central question [was] whether the State's program, and the consequences for non-participation in it, combine to create a compulsion that encumber[ed] [the prisoner's Fifth Amendment rights.]" *Id.* at 35. Referencing *Sandin*, the plurality held that a "prison clinical rehabilitation program . . . does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." *Id.* at 37-38. Turning to Lile's case, the Court noted that refusing to participate in sexual abuse treatment did not extend his term of incarceration, or affect his eligibility for good time credits or parole. *Id.* at 38. The Court also reasoned that the move to a maximum-security prison was not intended to punish Lile, but to make beds available to other inmates willing to participate in the program. *Id.* Finally, the plurality defined the consequences of Lile's reduction to Level I not as punishments, but as "incentives to behave," and reasoned that the "Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit." *Id.* at 39. Perquisites, the Court said, merely made prison life more tolerable. *Id.* at 42. Thus, the Court directed lower courts to "decide whether the consequences of

an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the de minimis harms against which it does not." *Id.* at 41. Because the consequences of Lile's refusal were de minimis, the Court ruled that his choice, though not voluntary in the colloquial sense, did not amount to compulsion. *Id.* at 44.

Justice O'Connor concurred with the plurality's judgment, but explicitly rejected the plurality's atypical and significant hardship standard, agreeing with the Stevens' plurality that the compulsion standard was broader than the test outlined in *Sandin*. *Id.* at 48-49. She concurred in the judgment, however, because she felt that the alterations in Lile's prison conditions resulting from his refusal to participate in treatment did not constitute compulsion since "[n]ot all pressure necessarily compels incriminating statements." *Id.* (alteration in original). Justice O'Connor cited some of the penalties the Court previously had identified as so great as to constitute compulsion. These included termination of employment, loss of professional license, inability to receive government contracts, and inability to hold public office. *Id.* at 49-50 (citations omitted). These were "grave" consequences, whereas the consequences Lile faced were minor. Justice O'Connor, however, explicitly rejected the portion of Justice Stevens' plurality opinion that reasoned that because the penalties for refusal to participate were the same penalties levied against prisoners for disciplinary violations, the punishments constituted compulsion. To the contrary, she noted that there "is a difference between the sorts of penalties that would give a prisoner a reason not to violate prison disciplinary rules and what would compel him to expose himself to

criminal liability." *Id.* at 52.

Relying on *McKune*, Renchenski contends that the penalties for refusing to participate in the SOTP rise to the level of compulsion and therefore violate his Fifth Amendment right against self-incrimination.[12] He contends that the District Court incorrectly focused on the plurality's atypical and significant hardship test, which requires a heightened showing to establish compulsion compared to the more modest showing required by Justice O'Connor's concurrence. Renchenski also argues that the District Court erred when it held that the only consequences of refusing to participate are that his name would be listed on the offender's roster as a "possible sex offender."

Even though Renchenski is correct that Justice O'Connor's concurrence controls, his Fifth Amendment claim nevertheless fails because the consequences he faces for refusing to participate in the SOTP do not rise to the level of compulsion even under Justice O'Connor's narrower standard. *See United States v. Naranjo*, 426 F.3d 221, 231 (3d Cir. 2005)(noting that when "no one view garners a majority of the Justices . . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds") (internal quotation marks & citation omitted). Renchenski's attempt to classify the consequences he faces as more severe than the consequences at issue in *McKune* is unpersuasive.

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[12] Like Kansas' treatment program, Pennsylvania's program requires participants to admit to all past crimes and offers no privilege for those confessions.

Renchenski first notes that his refusal to participate in sex offender treatment—a Class I violation—may result in loss of his prison job. While the Supreme Court has recognized that loss of livelihood amounts to compulsion, it has not done so in the prison context. To the contrary, in her concurrence, Justice O'Connor noted that a reduction in prison wages did not constitute compulsion because the "prison is responsible for caring for respondent's basic needs, [and therefore] his ability to support himself is not implicated by the reduction in wages he would suffer as a result." *McKune*, 536 U.S. at 51. This logic is equally applicable to loss of a prison job. Even if Renchenski lost his only source of income, the DOC would still provide him with food, shelter and access to medical care.

Renchenski counters that "[b]ecause he requires the income from his prison job to pursue the appeal of his conviction, loss of that job condemns him to remain in prison." Appellant's Br. at 38. This argument is entirely unpersuasive. Renchenski remains in prison because a jury of his peers convicted him of first degree murder and the likelihood of prevailing in a collateral attack on his 1984 conviction is far too remote to constitute a basic need for Fifth Amendment purposes. *See United States v. Hollis*, 569 F.2d 199, 205-06 (3d Cir. 1977)(noting the strong presumption that the judgments of state criminal courts are valid). Indeed, in January 2010, the Pennsylvania Superior Court dismissed Renchenski's petition for post-conviction relief, ruling that while his initial petition was timely, his decade-plus delay in pursuing his collateral attack constituted abandonment of his claim, and that

Renchenski's "failure to pursue his PCRA petition has now created a situation where the Commonwealth would be severely prejudiced were it required to retry the case." *Commonwealth v. Renchenski*, 988 A.2d 699, 703 (Pa. Super. Ct. 2010). In any event we do not think that Renchenski's desire to pursue a collateral attack on his 1984 conviction with wages earned from his prison job constitutes a "basic need" for Fifth Amendment purposes.

Nor do any of the other consequences Renchenski faces for refusal to participate in the SOTP rise to the requisite level of compulsion. Prison regulations list the following outcomes for failure to participate in the SOTP: assignment to disciplinary custody for ninety days, cell restriction for thirty days, suspension of the right to receive visitors, and loss of privileges such as access to television, radio and the commissary. *See* DC-ADM, 801, Inmate Disciplinary Procedures Manual § 4. (App. at 500-01.) As noted above, in *McKune* at least five Justices rejected the argument that loss of privileges, such as access to television and radio, as well as suspension of the right to receive visitors, constituted compulsion for Fifth Amendment purposes.

Furthermore, these "punishments" are the same consequences inmates face for a variety of infractions. In addition to refusing to attend mandatory rehabilitative correctional programs, Class I charges encompass refusing to obey an order, violating visiting regulations, failing to report contraband, etc. (App. at 517.) The consequences for committing any of these infractions are the same. In other words, Renchenski's refusal to participate in SOTP may result in the same consequence as another inmate's

failure to stand for count or refusal to participate in a drug treatment program. This is significant because in her *McKune* concurrence, Justice O'Connor specifically rejected Justice Stevens' conclusion that because "the penalties facing [Lile] for refusal to incriminate himself are the same as those imposed for prison disciplinary violations . . . they are coercive." 536 U.S. at 51. Here, Renchenski merely confronts the same penalties that his peers who commit any of the numerous enumerated Class I disciplinary violations face.

Moreover, in *McKune* Justice O'Connor rejected Lile's suggestion that transferring him to a maximum-security prison—a more dangerous prison—amounted to punishment. Here, Renchenski may be sent to disciplinary custody or placed on cell restriction. While this penalty will undoubtedly inconvenience and isolate Renchenski, it is a far less serious consequence than transferring a prisoner from a medium-to a maximum-security prison, which the Supreme Court previously found did not rise to the level of compulsion.

In short, loss of his prison job and other consequences that flow from his refusal to participate in the SOTP do not rise to the level of compulsion which would compel Renchenski to expose himself to criminal liability. Therefore, we affirm the District Court's grant of summary judgment in Defendants' favor on Renchenski's Fifth Amendment claim.

c. Remaining Constitutional Claims

Renchenski next contends that classifying him as a sex offender when he was never charged with, nor

convicted of, a sex offense violates his Sixth Amendment right to trial by jury. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. [The Supreme Court has] held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995)(quotation marks & citation omitted). Because he was found guilty of murder in the first degree under Pennsylvania law, and not with a crime that contains a sexual element, Renchenski claims that labeling him a sex offender and mandating his participation in behavioral modification therapy violates the Sixth Amendment.

Renchenski cites to Supreme Court cases that stand for the broad proposition that an individual accused of a crime may be found guilty based only on proof beyond a reasonable doubt of each element of the crime. *See In re Winship*, 397 U.S. 358,359 (1970) (holding that "proof beyond a reasonable doubt is among the essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.")(internal quotation marks omitted); *Cole v. Arkansas*, 333 U.S.196 (1948) (holding that the charging document must give the defendant notice of the elements of the charged crime). His reliance on these cases, however, is misplaced since they all involved criminal proceedings. *See United States v. Zucker*, 161U.S. 475, 481 (1896) (noting that the Sixth Amendment is limited to criminal proceedings); *Hannah v. Larche*, 363

U.S.420, 440 n.16 (1960) (affirming that Sixth Amendment protections apply only during criminal proceedings). Because Pennsylvania's SOTP is not a criminal proceeding, the Sixth Amendment is not implicated. Here, Defendants did not charge Renchenski with rape and adjudge him guilty of the crime. Rather, they evaluated his file and determined—albeit without the protections of due process—that the nature of his crime made him a candidate for sexual offender treatment.

Similarly, Renchenski's reliance on *Jenkins v.McKetihen*, 395 U.S. 411 (1969) is misplaced. *Jenkins* involved a challenge to Louisiana's Labor Management Commission of Inquiry, which was tasked with investigating alleged violations of state and federal labor law. Its purpose was to recommend to the governor whether there was probable cause to believe that an individual or organization had violated criminal laws. The Commission had the power to subpoena witnesses, but the target of the investigation could not call witnesses. The Supreme Court held that the Commission violated the Fourteenth Amendment because the Commission "exercises a function very much akin to making an official adjudication of criminal culpability." *Id.* at 427. The Court went on to note that:

> In the present context, where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford adperson being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights.

Id. at 429. Unlike the Commission in *Jenkins*, here Defendants are not accusing Renchenski of a new crime and making culpability judgments. Nor are Defendants concerned with exposing violations of criminal law. *Id.* at 428. Rather, they are focused on ensuring that sexual deviants receive the appropriate treatment to minimize the risk of future offense and to create a safer environment within the prison.

Renchenski's case is more akin to *Hannah v. Larche*, 363 U.S. 420 (1960), a case in which the Civil Rights Commission survived a due process challenge. The Civil Rights Commission was tasked with investigating allegations of voter suppression. Targets of the Commission challenged its constitutionality on due process grounds, arguing that they were entitled: (1) to notice of the nature of the charges against them; (2) to know the identity of the complainants; (3) and to cross-examine their accusers. The Supreme Court rejected these arguments, holding that the Commission "does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property." *Id.* at 441. Similarly here, Defendants are not adjudicating Renchenski guilty of rape; nor are they extending his sentence or determining civil liability. Rather, they are classifying him as a prisoner who, because of the nature of his crime, would benefit from sexual offender therapy. And although, as noted above, Defendants' actions do implicate Renchenski's liberty interest, this constitutional violation can be cured by affording him the appropriate due process. The liberty interest,

however, does not give rise to a Sixth Amendment claim and certainly does not transform Pennsylvania's correctional plans into criminal proceedings. Therefore, we affirm the District Court's grant of Defendants' motion for summary judgment based on Renchenski's Sixth Amendment claim.

The District Court also properly held that Defendants were entitled to summary judgment on Renchenski's equal protection claim. The Fourteenth Amendment's Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "To prevail on an equal protection claim, a plaintiff must present evidence that s/he has been treated differently from persons who are similarly situated." *Williams v. Morton*, 343 F.3d 212, 221 (3d Cir.2003).

> If state action does not burden a fundamental Constitutional right or target a suspect class, the challenged classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. If the challenged state action involves a suspect classification based on race, alienage or national origin, or infringes on a fundamental constitutional right, we must apply the strict scrutiny standard.

Doe v. Pennsylvania Bd. of Prob. and Parole, 513 F.3d 95, 107 (3d Cir. 2008) (internal quotation marks & citations omitted).

In his Amended Complaint, Renchenski accused Defendants of not providing him with "Equal

Protection of the Law by ignoring State and Federal laws while sanctioning the plaintiff as a sex offender without adhering to procedural safeguards provided for by the law." (App. at 75.) Although we are mindful that pro se complaints are to be construed liberally, *see Giles*, 571 F.3d at 322, we nevertheless affirm the District Court's ruling that Defendants are entitled to summary judgment on Renchenski's equal protection claim. Renchenski did not allege, nor raise a material issue of fact demonstrating that Defendants treated him differently because he is a member of a suspect class or because he exercised a fundamental right. *See City of Cleburn v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

Nor can Renchenski maintain an equal protection claim based on the "class of one" theory of liability outlined by the Supreme Court in *Village of Willowbrook v. Olech*, 528 U.S.562 (2000). In *Olech*, the Court permitted a plaintiff to proceed on a class of one theory when the plaintiff alleged that she had been "intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment." *Id.* at 564; *see also Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 243 (3d Cir. 2008). Here Renchenski argues that "the state has created a suspect 'class of one' into which [Renchenski] has been placed . . . [and that] there are no 'similarly situated' individuals due to [Renchenski] having no sex offense history." Appellant's Reply Br. I at 17. His claim fails because he has adduced no evidence of unequal treatment, and in order to forestall summary judgment, Renchenski must bring forth enough evidence from which a reasonable jury could find in his favor. Here, he makes mere conclusory allegations. And these allegations, even if accepted as true, fall

short. He does not allege, for example, that he is the only inmate in SCICT who, though not charged or convicted of a sex offense, was nonetheless labeled a sex offender based on a history of abusive sexual behavior and recommended to sex offender therapy. Therefore, the District Court properly granted summary judgment in Defendants' favor on Renchenski's Equal Protection Clause claim.

Similarly, Defendants are entitled to summary judgment on Renchenski's Eighth Amendment claim. The Eighth Amendment "prohibits punishment which violate[s] civilized standards of humanity and decency." *Griffin v. Vaughn*, 112 F.3d 703, 709 (3d Cir. 1997) (citation omitted). To prove a violation of the Eighth Amendment, a plaintiff must demonstrate that prison conditions deprived him of life's minimum necessities, that the deprivation was sufficiently serious, and that "a prison official acted with deliberate indifference in subjecting him to that deprivation." *Id.* Prison "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." *Union Cnty. Jail Inmates v. DiBuono*, 713 F.2d 984, 997 (3d Cir. 1983) (quoting *Rhodes v.Chapman*, 452 U.S. 337, 347 (1981)).

Renchenski presents no evidence that he was denied food, water, clothing, shelter, sanitation, or medical care. Rather, he argues that the Defendants' actions caused him "extreme stress and anxiety." (App. at 75.) We have held that "[e]motional distress can produce injury of the same severe magnitude as occurred in the cases of physical harm and withholding necessary medical care, and it can be inflicted in the same wanton and unreasonable

manner." *Rhodes v. Robinson*, 612 F.2d 766, 772 (3d Cir. 1979). To succeed on an Eighth Amendment claim predicated on emotional distress, however, we also require that the defendant's wanton and unnecessary infliction of emotional harm include an improper state of mind. *Id.* "Where a person suffers injury as an incidental and unintended consequence of official actions, the abuse of power contemplated in the due process and Eighth Amendment cases does not arise." *Id.* Renchenski's complaint lacks any allegation that Defendants acted with the requisite culpability necessary to finding an Eighth Amendment violation. Rather, the stress Renchenski suffered was incidental to Defendants' official actions. While we do not doubt being labeled a sex offender caused Renchenski stress and anxiety, dubbing him a sex offender and mandating behavioral modification therapy does not constitute a deprivation of any basic human need. Accordingly, the District Court properly entered summary judgment in Defendants' favor on Renchenski's Eighth Amendment claim.

2. Procedural Challenge

Although we reverse the entry of summary judgment as to Renchenski's Fourteenth Amendment claim and affirm the District Court's Order in all other respects, we pause here to briefly address Renchenski's argument that the District Court improperly converted Defendants' motion to dismiss into a motion for summary judgment without permitting him leave to take discovery.

Federal Rule of Civil Procedure 56(f) provides that a party opposing a motion for summary judgment may file an affidavit asking the court to stay its decision

while he or she conducts discovery to ascertain facts essential to justifying his or her opposition. Renchenski maintains that the District Court should have stayed its disposition of the converted motion for summary judgment and afforded him the opportunity to take discovery on: (1) the consequences he may have been subject to for refusal to participate in the SOTP; (2) Pennsylvania's application of the sex offender label to prisoners never convicted of a sex offense; (3) the SOTP's nature and details;(4) Renchenski's PSR and the coroner's report; and (5)Renchenski's classification on the sex offender roster. While he did not file a formal Rule 56(f) affidavit, in his opposition to Defendant's Supplemental Brief, Renchenski clearly addressed the difficulty of disputing the DOC's asserted facts because he had not yet been allowed discovery. (App. at 372 ("The plaintiff has thus far been denied any type of discovery materials and it is impossible for him to view, challenge, or verify that those Standards and Practices [of the SOTP] are indeed written as the defendants claim, and that the defendants are in fact following them.")).[13]

Although we review the District Court's refusal to delay its ruling on Defendants' summary judgment motion under the deferential abuse of discretion standard, we remain concerned over the District

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[13] At the time the District Court ordered Defendants to file a supplemental brief to satisfy its concern over potentially legally significant material facts, and before the District Court converted Defendants' motion to dismiss into a motion for summary judgment, Renchenski's discovery request was pending.

Court's disposition of this case. We have held that while "it would be desirable in the interest of clarity for an order to expressly notify the parties that the court was converting a motion to dismiss into one of summary judgment or that the ruling would be pursuant to Rule 56, the court need not be so explicit so long as the order otherwise fairly apprises the parties of the proposed conversion." *Rose v. Bartle*, 871F.2d 331, 342 (3d Cir. 1989) (citations and & quotation marks omitted).[14] Here, the Order noted that the District Court intended to rely on matters outside of the pleadings in its ruling, and correctly stated that notice of the conversion and an opportunity to respond are required. Nevertheless, we are concerned that the notice may have been inadequate because the Court never informed Renchenski of Rule 56's requirements, his need to file a Rule 56(f) affidavit to forestall Defendants' motion for summary judgment, or of the consequences for his failure to do so. *Cf. Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir.1992) (holding that the district court abused its discretion in converting a motion to dismiss into a summary judgment motion when the court did not inform the pro se prisoner of the consequences of failing to file a Rule 56(e) affidavit); *Lewis v. Faulkner*, 689 F.2d 100, 101 (7th Cir. 1982) (same).

In *Kelly*, the district court converted the defendants' motion for dismissal into a motion for summary judgment without informing the pro se

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[14] We do not know whether the District Court sent Renchenski a paper copy of its June 6, 2007 Order giving notice of its intent to convert Defendants' motion to dismiss into a motion for summary judgment.

prisoner that the court was treating the defendants' motion pursuant to Rule 56. Holding that the district court prematurely disposed of the summary judgment motion, the D.C. Circuit reasoned that:

> A district court cannot properly act on a motion for summary judgment without giving the opposing party a reasonable opportunity to submit affidavits that contradict the affidavits submitted in support of the motion and demonstrate that there is a genuine issue of material fact. . . . [R]easonable opportunity presupposes notice. . . . [M]ere time is not enough, if knowledge of the consequences of not making use of it is wanting.

963 F.2d at 456 (citation & quotation marks omitted). The D.C. Circuit further concluded that in order for notice to be adequate, it must explain the consequences of a Rule 56 motion and the effect of a failure to file a Rule 56(e) affidavit in opposition, which are particularly important in the pro se prisoner context. *Id.* Thus, the D.C. Circuit noted, in dicta, that incarcerating governmental defendants should assist district courts in providing proper notice to prisoner pro se plaintiffs by including in their motions for summary judgment a plain statement that any factual assertions in the movant's affidavits will be accepted by the district court as true unless the plaintiff submits his or her own affidavit or documentary evidence contradicting the assertions. The D.C. Circuit also required that Rule 56's text be sent to the prisoner-plaintiff in addition to a short and plain statement summarizing the appropriate portion of Rule 56. When the government failed to provide such notice, the court placed the burden on the district court to send proper notice to the prisoner-

plaintiff. Several other circuits have taken a similar view and have required district courts and governmental defendants to inform pro se prisoner-plaintiffs of the contours of Rule 56 and of the specific consequences for failure to submit an opposing affidavit. *See generally Graham v. Lewinski*, 848F.2d 342, 344 (2d Cir. 1988); *Brown v. Shinbaum*, 828 F.2d 707,708 (11th Cir. 1987); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7thCir. 1982); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir.1975); *but see Martin v. Harrison County Jail*, 975 F.2d 192(5th Cir. 1992); *Brock v. Hendershott*, 840 F.2d 339, 343 (6thCir. 1987) (holding no additional procedure beyond that outlined in Rule 56 is necessary in the non-prisoner pro se context);*Jacobsen v. Filler*, 790 F.2d 1362, 1364-67 (9th Cir. 1986)(same).

We agree with the majority of our sister circuits that adequate notice in the pro se prisoner context includes providing a prisoner-plaintiff with a paper copy of the conversion Order, as well as a copy of Rule 56 and a short summary explaining its import that highlights the utility of a Rule 56(f) affidavit.[15] While we are mindful that this extra requirement imposes some burden upon the district courts as well as governmental defendants, we believe this burden is slight especially since generic language can be readily compiled and disseminated as needed. We therefore trust that in the future, the State and Federal Governments, as well as our district courts, will work together to ensure pro se prisoner-plaintiffs receive adequate notice of an imminent motion for summary

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[15] In our view, the reasons for providing adequate notice to incarcerated plaintiffs in the Rule 56(e) context apply with equal force to Rule 56(f).

judgment. "The failure to give adequate notice does not, however, require automatic reversal; it may be excused if the failure was a harmless error. Thus, [a] judgment may be affirmed if it appears that there is no set of facts on which plaintiffs could possibly recover." *Rose*, 871 F.2d at 342 (internal quotation marks & citations omitted). As noted above, there are no set of facts on which Renchenski could recover on his Fifth Amendment, Sixth Amendment, Eighth Amendment or equal protection claims. Therefore, the District Court's conversion of Defendants' motion to dismiss into one for summary judgment and disposition of the case before Renchenski had proper notice to respond was harmless.

IV.

For the foregoing reasons, we will reverse the District Court's grant of summary judgment in Defendants' favor as to Renchenski's Due Process Clause claim. In all other respects, we affirm the District Court's Order.

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES S. RENCHENSKI, Plaintiff	:	CIVIL ACTION NO. 3:06-CV-278
v.	:	(JUDGE CONABOY)
THOMAS WILLIAMS, et al., Defendants	:	(Magistrate Judge Smyser)

MEMORANDUM

Here we consider Magistrate Judge J. Andrew Smyser's Report and Recommendation (Doc. 51) in which Magistrate Judge Smyser recommends Defendants' Motion to Dismiss the Amended Complaint (Doc. 39) be granted and Plaintiff's Amended Complaint (Doc. 29) be dismissed. This 42 U.S.C. § 1983 action requires us to consider whether Plaintiff Charles S. Renchenski's constitutional rights are violated by the Pennsylvania Department of Corrections' ("DOC") recommendation that he participate in a sex offender treatment program as well as the methodology used in making that recommendation. For the reasons that follow, we conclude the actions complained of do not rise to the level of a constitutional violation and, therefore, cannot form the basis of this 42 U.S.C. §1983 action.

Also pending before the Court are the following motions filed subsequent to the issuance of the Report and Recommendation: Plaintiff's Leave to Amend the

Complaint (Doc. 67), Motion to Strike Plaintiff's Second Amended Complaint (Doc. 71) and Plaintiff's Leave to Amend the Complaint (Doc. 73).[17] For the reasons discussed below, we will construe Plaintiff's Motion to Strike his Second Amended Complaint (Doc. 71) as a motion to withdraw his first Leave to Amend the Complaint (Doc. 67) and grant the motion. Further, we deny Plaintiff's second Leave to Amend the Complaint (Doc. 73) in which he seeks allowance to file a Second Amended Complaint (Doc. 73-3).

I. Background

A. FACTUAL BACKGROUND

Plaintiff Charles S. Renchenski ("Plaintiff"), currently incarcerated at the State Correctional Institution at Coal Township ("SCI-Coal Township"), Coal Township, Pennsylvania, is serving a life sentence without parole, having been convicted of murder in 1985. (Doc. 64 at 3-4, 6, Defendant's Supplemental Brief.) The official version of the crime for which Plaintiff was convicted indicates there was a sexual component to the crime, as the victim and Plaintiff were engaged in a sexual act when the homicide occurred. (*Id.*; Doc. 63 ¶ 10, Defendant's Supplemental Statement of Facts.) As reported by the Chief Prison Psychologist at SCI-Coal Township, the record shows that "[d]uring the course of the sex act, the victim was choked and beaten numerous times about the head, breast and genital area. In addition

[17] The Procedural Background section of this Memorandum further explains the redundant and somewhat confusing titles Plaintiff has assigned to various filings.

the victim's breasts were slashed with a razor blade." (Doc. 63-2 Ex. A ¶ 13, Unsworn Declaration of John Sidler.)

When the underlying circumstances of an inmate's offense contains a sexual component, sex offender treatment programming is automatically made part of the inmate's Correctional Plan. (Doc.63 ¶ 9.) Recommended programming may be a requirement of an inmate's correctional plan, but an inmate's participation in the specific program is voluntary. (Doc. 64-2 ¶ 6.)

When Plaintiff was first received into the DOC in 1985, his correctional plan noted areas of concern, including sexual. (Doc.63-2 ¶ 14.) The decision to recommend him for sex offender programs was based on the Treatment Team's evaluation of him and the sexual component of his offense. (*Id.*)

Plaintiff asserts that while he was incarcerated at SCI-Huntingdon (prior to his transfer to SCI-Coal Township), he had succeeded in having the requirement that he participate in sex offender programming removed from his record. (Doc. 29 at 2 (*citing* Exs. 1-3).) Plaintiff also maintains that on March 31, 2003, at his first annual review after being transferred to SCI-Coal Township, his counselor (Defendant Williams) decided he needed sex offender treatment therapy. (Doc. 29 at 2.)

According to the DOC's current Sex Offender Treatment Programming ("SOTP"), assessments of those inmates incarcerated prior to the effective date of the new policy occur at the time the staff is ready to initiate a new sex offenders group. (Doc. 63-2 at 4.)

Therefore, although Plaintiff's prescriptive plan requires sex offender treatment therapy (which begins with evaluation) Plaintiff has not been evaluated because he has refused to participate in any sex offender treatment programming. (Doc. 63-2¶ 19.)

To date, Plaintiff's refusals to participate in sex offender programming have not affected his parole status because he is serving life without parole, nor has his refusal affected sentence commutation because he has not applied for same. (*Id.*) Plaintiff's name appears on the institutional sex offender's roster as a possible sex offender because of the sexual component of his offense, but he has not been classified as a sex offender because he has not participated in any sex offender treatment programs. (*Id.*)

B. PROCEDURAL BACKGROUND

Plaintiff filed this action *pro se* on February 6, 2006, naming Thomas Williams, a prison counselor, Joseph Piazza, prison superintendent, and the Pennsylvania Department of Corrections as defendants.[18] Defendants filed a motion to dismiss the Complaint on April 14, 2006 (Doc. 16), and a supporting brief on April 28, 2006 (Doc. 18). A brief in opposition to the motion was filed on June 2, 2006 (Doc. 26). By Order of June 19, 2006, the Court allowed Plaintiff to file an amended complaint. (Doc. 27.) Plaintiff filed his Amended Complaint on June 28, 2006. (Doc. 29.)

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[18] Unless otherwise noted, the Procedural Background is derived from the Report and Recommendation (Doc. 51).

In his Amended Complaint, Plaintiff adds five (5) defendants. Three are current or former SCI-Coal Township employees, and the fourth is the Grievance Officer at the Department of Corrections main office in Camp Hill, Pennsylvania. (Doc. 29 at 1.) Plaintiff also expands the scope of the Complaint to add a period of time which includes his previous incarceration at SCI-Huntingdon. Plaintiff's basic claim is that he is wrongfully being required to participate in sex offender treatment programming in violation of his constitutional rights and various state and federal laws. (Doc. 29 at 5-6.) Specifically, Plaintiff alleges his Fifth Amendment rights against self-incrimination are violated because the programming requires admission of guilt for crimes he did not commit that could be used against him in his current state appeal of his criminal conviction. (*Id.* at 5.) He also asserts his Sixth Amendment rights have been violated in that the programming requirement in effect adjudicated Plaintiff guilty of a felony crime (of being a sex offender) without a trial by jury. (*Id.* at 6.) Plaintiff claims an Eighth Amendment violation based on his assertion that the programming requirement subjected him to cruel and unusual punishment by causing extreme stress and anxiety. (*Id.*) Plaintiff also claims violations of the Fourteenth Amendment, both due process and equal protection. (*Id.*) Finally, Plaintiff claims violation of various state and federal laws. (*Id.*)

Plaintiff seeks compensatory, punitive and nominal damages, and an order expunging all records of any sex offender reference, barring retaliation and transfer to another institution as well as barring Defendants from requiring him to participate in sex

offender programming.

Defendants filed a motion to dismiss the Amended Complaint on September 14, 2006 (Doc. 39), and a brief in support on September28, 2006 (Doc. 44). A brief in opposition to the motion to dismiss was filed on October 23, 2006. (Doc. 49.)

The Magistrate Judge addressed Defendants' Motion to Dismiss the Amended Complaint in the Report and Recommendation here considered (Doc. 51). The Report and Recommendation was issued on December 12, 2006. Plaintiff filed objections on December 29, 2006. (Doc. 52.)

Defendants filed a brief in opposition to Plaintiff's objections on January 19, 2007. (Doc. 53.) Because of errors contained in the brief, the Court directed Defendants to file a corrected brief. (Doc. 54.) After filing for an extension of time (Doc. 55), Defendants filed their response to Plaintiff's objections on January 31, 2007. (Doc. 57.) Plaintiff filed two reply documents, one on January 31, 2007, (Doc. 57-1) and the other on April 19, 2007, (Doc. 59).

By Order of April 27, 2007, the Court directed Defendants to file a supplemental brief addressing certain specific issues. (Doc. 60.) After filing a motion for extension of time to file the supplemental brief (Doc. 61), Defendants filed a supplemental statement of facts (Doc. 63) and the required brief (Doc. 64) on May 29, 2007. Plaintiff filed a reply to Defendants' supplemental brief on June 14, 2007. (Doc. 66.)

On June 6, 2007, the Court issued an Order notifying the parties of the intent to consider the

pending Motion to Dismiss as one for summary judgment and providing them an opportunity to present additional materials. (Doc. 65.) This decision was made based upon review of the documents filed up to that point in connection with the pending motion to dismiss and the determination that the Court would consider matters outside the pleadings. *See Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989).

Following issuance of the notice of conversion Order, Plaintiff filed a document titled "Leave to Amend the Complaint" (Doc. 67), seeking permission to further amend his Amended Complaint (Doc. 29). Plaintiff's Brief in Support of His Amended Complaint was filed on June 20, 2006. (Doc. 68.) In this Amended Complaint, Plaintiff sets out only a claim for libel against prison personnel not previously named. (Doc. 67-2.)

On June 27, 2007, Plaintiff filed a Motion to Strike Plaintiff's Second Amended Complaint (Doc. 71) wherein Plaintiff asserts he wants to rely on his first Amended Complaint (Doc. 29) because his second Amended Complaint contains only one new claim and he does not wish to waive the claims raised previously. (*Id.*) Plaintiff also notes his intention to file a properly amended complaint in which all claims are set out. (*Id.*)

On July 9, 2007, Defendants filed a response to the Court's conversion Order of June 6, 2007, asserting that in light of Plaintiff's intent to rely on his original Amended Complaint and his other recent filings, they would not be submitting any additional material in support of their pending motion and would rely on their previous filings in support of their position that

summary judgment should be granted in their favor. (Doc. 72.)

On July 10, 2007, Plaintiff filed another Leave to Amend the Complaint (Doc. 73) seeking leave to file a "Second Amended Complaint" in which he incorporates the claims of his first Amended Complaint (Doc. 29) and the claim for libel he sought to include in his second Amended Complaint (Doc. 67-2) as well as a claim for slander and an Ex Post Facto Clause claim (Doc. 73-3).

II. Discussion

For reasons discussed below, we will deny Plaintiff's Leave to Amend the Complaint (Doc. 73) in which he seeks to file a Second Amended Complaint (Doc. 73-3) adding additional defendants and claims based on the Ex Post Facto Clause, libel and slander to his original Amended Complaint (Doc. 29). With this decision, the substantive issues before the Court are those raised in Plaintiff's objections to the Magistrate Judge's Report and Recommendation. (Doc. 52.)

The issues raised in Plaintiff's objections to the Report and Recommendation are the following: 1) the Magistrate Judge did not address Plaintiff's due process claim (Doc. 52 at 2); 2) the Magistrate Judge failed to address Plaintiff's Fourteenth Amendment Equal Protection claim (*id.* at 4); 3) the Magistrate Judge did not correctly consider Plaintiff's Fifth Amendment self-incrimination claim (*id.* at 5); 4) the Magistrate Judge did not address the issue of Plaintiff being falsely stigmatized as a sex offender when he was never accused, charged or convicted of a sex

offense (*id.* at8); 5) the Magistrate Judge did not address Plaintiff's Sixth Amendment rights (*id.* at 9); 6) the Magistrate Judge did not consider Plaintiff's Eighth Amendment rights against cruel and unusual punishment (*id.* at 10); and 7) the Magistrate Judge did not recognize that Plaintiff is challenging his criminal complaint (*id.* at 11).

When a magistrate judge makes a finding or ruling on a motion or issue, his determination should become that of the court unless objections are filed. *See Thomas v. Arn*, 474 U.S. 140, 150-53 (1985). When no objections are filed, the district court need only review a record for clear error. *See Cruz v. Chater*, 990 F. Supp. 375, 377 (M.D. Pa. 1998). However, when a plaintiff files objections to the magistrate judge's Report and Recommendation, the district judge makes a *de novo* review of the matters to which objection is made. *See* 28 U.S.C. § 636(b)(1)(C); *Cippolone v. Liggett Group, Inc.*, 822 F.2d 335, 340 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

Because Plaintiff has filed objections to the Report and Recommendation, we will make a *de novo* determination regarding the matters to which Plaintiff has objected. We will otherwise review the record for clear error. The standard employed in our review will be the standard for summary judgment as we have converted Defendants' Motion to Dismiss the Amended Complaint (Doc. 39) to a motion for summary judgment (*see* Doc. 65).

Having conducted a thorough review of the issues raised in Plaintiff's objections and related filings, for the reasons set out below we conclude Plaintiff has not provided a basis to proceed with this action.

Therefore, summary judgment of this action is appropriate.

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Knabe v. Boury*, 114 F.3d 407, 410 n.4 (3d Cir. 1997)(*citing* Fed. R. Civ. P. 56(c)). "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

A fact is "material" if proof of its existence or nonexistence would affect the outcome of the lawsuit under the law applicable to the case. *Id.* at 248; *Levendos v. Stern Entertainment Inc.*, 860 F.2d 1227, 1233 (3d Cir. 1988). An issue of material fact is "genuine" if the evidence is such that a reasonable jury might return a verdict for the non-moving party. *Anderson*, 477 U.S. at 257. In determining whether a genuine issue of fact exists, a court must resolve all factual doubts and draw all reasonable inferences in favor of the nonmoving party. *Conoshenti v. Public Serv. Elec. & Gas Co.*, 364 F.3d 135, 140 (3d Cir. 2004) (citation omitted).

B. PLAINTIFF'S OBJECTIONS TO THE REPORT AND RECOMMENDATION

Because Defendants argue and the Magistrate Judge concludes United States Supreme Court precedent regarding Plaintiff's Fifth Amendment self-incrimination claim is controlling of Plaintiff's action, we will first consider his Fifth Amendment claim.

1. Fifth Amendment Self-Incrimination Claim

Plaintiff objects to the Report and Recommendation on the basis that the Magistrate Judge did not properly assess his Fifth Amendment self-incrimination claim and, because he has not been convicted of any sex offense and has a pending appeal in state court, required participation in sex offender programming violates his Fifth Amendment right against self-incrimination. (Doc. 52 at 5-8.) For the reasons discussed below, we conclude Plaintiff's Fifth Amendment rights have not been violated.

The Fifth Amendment Self-Incrimination Clause which applies to the states through the Fourteenth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." *McKune v. Lile*, 536 U.S. 24, 35 (2002) (citations omitted). The Court stressed that "compulsion" is the central element of the constitutional guarantee which is "only that the witness not be *compelled* to give self-incriminating testimony. *Id.* at 35-36. "The privilege does not terminate at the jailhouse door, but the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis." *Id.* at 36.

McKune considered the compulsion inquiry in the context of prison rehabilitation programs, commenting that "the inquiry must consider the

significant restraints already inherent in prison life and the State's own vital interests in rehabilitation goals and procedures within the prison system." *McKune*, 536 U.S. at 37. The Court further explained:

> A prison clinical rehabilitation program which is acknowledged to bear a rational relation to a legitimate penological objective, does not violate the privilege against self-incrimination if the adverse consequences an inmate faces for not participating are related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.

McKune, 536 U.S. at 37-38.

In *McKune*, the plaintiff was a convicted sex offender for whom prescribed sex offender treatment would require the disclosure of all prior sexual activities, regardless of whether such activities constituted uncharged criminal offenses. 536 U.S. at 29-30. Focusing on the compulsion aspect of the self-incrimination inquiry, the Court found the consequences for the plaintiff's refusal to participate in sex offender treatment – transfer to less desirable prison facilities – did not amount to consequences which would compel a prisoner to reveal information about past crimes despite a desire to remain silent. *Id.* at 36.

The methodology set out by the Supreme Court to analyze whether prison rehabilitation programs implicate Fifth or Fourteenth Amendment self-incrimination concerns can be broken down into three elements. If the program and its application to the

plaintiff satisfy all three, the Plaintiff has not satisfied the requirements of a violation of the constitutional privilege against self-incrimination. *McKune*, 536 U.S. at 37-38. First, the program must bear a rational relationship to a legitimate penological objective. *Id.* Second, the adverse consequences for not participating must be related to the program objective. *Id.* Third, the adverse consequences do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life. *Id.*

Although the plaintiff in *McKune* was a convicted sex offender and here Plaintiff is not, the Supreme Court's methodology for analyzing a self-incrimination claim is not limited to the facts of the case and is equally applicable here. In this case, Plaintiff was not charged with a sex offense, but prison officials at SCI-Coal Township determined that, based on the nature of his crime, his prescriptive programming would include a requirement that he attend sex offender programming. (Doc. 63-2 Ex. A ¶¶ 10-15, Sidler Affidavit.) As reported by SCI-Coal Township Chief Prison Psychologist John P. Sidler, the record shows that "[d]uring the course of the sex act, the victim was choked and beaten numerous times about the head, breast and genital area. In addition the victim's breasts were slashed with a razor blade." (Doc. 63-2 Ex. A ¶ 13.)

In general terms, it cannot be debated that the sex offender treatment program bears a rational relationship to the legitimate penological objective of assessing and rehabilitating those inmates with convictions of sexual offenses and those inmates whose records indicate a potential problem of a sexual nature. In specific terms, given the background

information on Plaintiff's offense of conviction and the deference due prison officials, we cannot say the sex offender treatment requirement in this case does not bear a rational relationship to a legitimate penological objective.

Turning to the second element of the self-incrimination analysis regarding the relationship of the adverse consequences for not participating to the program objective, here essentially no adverse consequences flow from Plaintiff's refusal to participate in the required programming. Plaintiff does not specifically identify adverse consequences resulting from non-participation. Rather, he states the following:

> If the plaintiff is not classified or registered as the defendants are now claiming then there is no need for any sex offender programming and no threat of sanctions for non participation whatsoever, which obviously is not the case as evidenced by the defendants stating that non compliance could result in sanctions.

(Doc. 66 at 15 (*citing* Doc. 64 at 10).) Plaintiff citation refers to Defendants' assertion that Plaintiff's "voluntary choice to refuse to participate in this program is of no consequence." (Doc. 64 at 10.) Defendants go on to explain Plaintiff's refusals to participate in sex offender programming "have not affected his parole status, as he is serving a life sentence without parole, nor has he sought a sentence commutation." (*Id.*) Defendants further assert that, although Plaintiff's name appears on the institutional sex offender's roster as a possible sex offender, he has not been classified as a sex offender because he has

refused programming and assessment occurs when an inmate agrees to participate: "If he truly believes that he does not belong in any [sex offender treatment programming], he can simply sign up for the programming and be assessed by the SCI-Coal Township staff." (Doc. 64 at 10.)

Given these facts, to date the only possible consequence of not participating which could be considered adverse would be the appearance of Plaintiff's name on the institutional sex offender's roster as a possible sex offender. We conclude this "adverse consequence" would not support a self-incrimination claim pursuant to *McKune* as it is a consequence related to the program objective.536 U.S. at 37-38. To identify an inmate with Plaintiff's crime of conviction as a *possible* sex offender on an internal prison roster pending his voluntary assessment can easily be seen as related to the program objective of encouraging participation and assessment. *Id.*

Finally, as to the third *McKune* consideration, we conclude the "adverse consequence" of being identified as a possible sex offender on an internal prison roster does not constitute an atypical and significant hardship in relation to the ordinary incidents of prison life. *Id.* Given the sexual component of Plaintiff's crime of conviction, the common routine of inmates being required to attend prescriptive programming, and the deference due prison officials in the administration of rehabilitation programs which encompasses their ability to consider matters underlying the crime of conviction and any history established in the record, *see, e.g., Chambers v. Colorado Dep't of Corrections*, 205 F.3d 1237, 1242 (10th Cir.), *cert. denied*, 531 U.S. 974, 531 U.S. 962

(2000); *see also Jamieson v. Robinson*, 641 F.2d 138, 142 (3d Cir. 1981), Plaintiff's listing as a possible sex offender on the prison roster is not outside the "ordinary incidents of prison life" for an inmate who totally refuses to participate in prescribed programming.

Based on this three-part analysis, the requirement that Plaintiff participate in sex offender programming does not violate the constitutional privilege against self incrimination: here the clinical rehabilitation program bears a rational relation to a legitimate penological objective, the adverse consequences Plaintiff faces for not participating are either non-existent or related to program objectives, and being listed on an internal prison roster as a possible sex offender does constitute an atypical and significant hardship in relation to the ordinary incidents of prison life. *See McKune*, 536 U.S. at 37-38. Therefore, Plaintiff's Fifth (Fourteenth) Amendment self-incrimination claim is without merit and cannot provide a basis for his 42 U.S.C. § 1983 action.[19]

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[19] We note Plaintiff alleges Defendants' assertions regarding sex offender programming are not believable. (*See* Doc. 66.) Because many of Plaintiff's arguments are not germane to our analysis and the remaining claims are without merit, they warrant only brief discussion.

As to Plaintiff's challenge regarding the "voluntary" nature of sex offender programming and whether he is "required" to attend (*see, e.g.*, Doc. 66 at 3, 7), we note a prescriptive recommendation may in fact be a requirement in certain senses and may not be voluntary in the common usage of the word, but these words take on distinct meanings in the context of the constitutional claim at issue here. In the context of a constitutional inquiry regarding (continued...)

whether someone is being compelled to be a witness against himself, participation is "voluntary in the only sense necessary" for the self-incrimination inquiry if an inmate is not "compelled to participate in the [sex offender treatment program]." *McKune*, 536 U.S. at 44. "Whether the inmates are being asked or ordered to participate depends entirely on the consequences of their decision not to do so." Id. As discussed in the text, given the current posture of his case and nature of his sentence, Plaintiff does not point to any adverse consequences he has or will suffer related to his decision not to participate in sex offender programming other than being listed on the prison roster as a sex offender.

Plaintiff repeatedly asserts that he is improperly required to participate in sex offender treatment because he is not a convicted sex offender. (*See, e.g.*, Doc. 66 at 5.) In the same vein, Plaintiff disputes the underlying sexual component of his crime - the rationale upon which Defendants assert the prescribed participation is appropriate, see supra pp. 11-12. In addition to our previous discussion of these contentions in the text, we emphasize our reliance on the general principle that "prison authorities are given wide latitude in determining programs of treatment." *Jamieson*, 641 F.2d at 142. We also find support for our conclusion here in cases recognizing that required participation in corrective programming is included in the discretion given prison administrators, discretion that is not diminished when an inmate maintains he does not need the program prescribed. *Hull v. Gillis*, Civ. A. No. 3:03-CV-1524, 2006 WL 2290412 (M.D. Pa. Aug. 8, 2006); *Garvin v. Terhune*, 157 F. Supp. 2d 416, 418 (D.N.J. Aug. 24, 2001). Further, although Plaintiff disputes the validity of his underlying conviction (*see, e.g.*, Doc.66 at 4) and some of Defendants' assertions regarding the offense of conviction (*see, e.g., id.* at 5, 6), he stands convicted of a crime where the victim died as a result of injuries sustained during the sex act, *see supra* p. 12.

Plaintiff argues the Magistrate Judge erred in failing to address his Fourteenth Amendment procedural due process claim. (Doc. 52 at 2.) The essence of Plaintiff's objection is that procedural due process rights attach when an inmate is forced to undergo involuntary treatment. (*Id.* at 3 (*citing Washington v. Harper*, 494 U.S. 210 (1980).)

Although we could summarily dispose of this objection because, as discussed above, Plaintiff has presented no evidence that he is being forced to undergo involuntary treatment, Plaintiff's broader discussion in his reply brief (Doc. 66) of a liberty interest as the basis for his Fourteenth Amendment due process claim warrants greater discussion.

A reviewing court analyzes a procedural due process claim in two steps: "(1) whether the asserted individual interests are encompassed within the fourteenth amendment's protection of life, liberty, or property; and (2) whether the procedures available provided the plaintiff with due process of law." *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) (internal quotation omitted). Two situations may give rise to a prisoner liberty interest such that due process is required. The first is where "the Due Process clause itself confers a liberty interest." *Sandin v. Conner*, 515 U.S. 472, 479 n.4 (1995). As identified in *Sandin*, the Court found a prisoner had a liberty interest in being free from involuntary transfer to a state mental hospital – it was "'qualitatively different' from the punishment characteristically suffered by a person convicted of crime, and had 'stigmatizing consequences.'" *Id.* (*quoting Vitek v. Jones*, 445 U.S. 480, 493-94 (1985)). *Sandin* also recognized an inmate's liberty interest in being free from the

involuntary administration of psychotropic drugs announced in *Washington v. Harper*, 494 U.S. 210, 221-22 (1990). *Sandin*, 515 U.S. at 479 n.4.

In addition to the independent liberty interests, "States maunder certain circumstances create liberty interests which are protected by the Due Process Clause." *Id.* at 483-84 (citation omitted). The Court went on to explain

> these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, ... nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 484.

a. Liberty Interest Relative to Sex Offender Programming

Whether a prisoner may have a liberty interest in not being labeled a sex offender and/or not being required to participate in sex offender programming has not been decided by the Supreme Court or the Third Circuit Court of Appeals. Circuits which have considered the issue have reached different results.

The Ninth Circuit Court of Appeals addressed the issue of whether an inmate had a liberty interest (and attendant procedural due process protections) in not being labeled a sex offender in *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997). The plaintiff had been charged with robbery, sexual assault, terroristic

threatening and attempted murder. *Neal*, 131 F.3d at 822. He entered into a plea agreement in exchange for dismissal of the sex offense charges. *Id. Neal* held the inmate had a liberty interest and was entitled to the procedural due process protections announced in *Wolff v. McDonnell*, 418 U.S. 539 (1974),[20] providing the following rationale: "the stigmatizing consequences of the attachment of the 'sex offender' label coupled with the subjection of the targeted inmate to a mandatory treatment program whose successful completion is a precondition for parole eligibility create the kind of deprivations of liberty that require procedural protections." 131 F.3d at 830.

The Tenth Circuit Court of Appeals found a liberty interest was implicated in a similar situation in *Chambers v. Colorado Dep't of Corrections*, 205 F.3d 1237 (10th Cir. 2000). The plaintiff was serving a thirty-nine (39) year sentence for aggravated robbery and attempted theft. *Id.* at 1238. Two years after the plaintiff began serving the sentence, he was classified as a sex offender with prescribed participation in sex offender group therapy session based on information in his presentence report of a 1983 sexual assault. *Id.* His participation was based on an internal Colorado

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[20] *Wolff* provides the following minimum procedural protections: 1) written notice of the charge at least twenty-four hours before the hearing; 2) an opportunity to present witnesses and documentary evidence; 3) an impartial tribunal; 4) a written statement by the adjudicatory board describing the evidence relied upon and the reasons for reaching its decision; and 5) if the inmate is illiterate or the issues are so complex that the inmate is unable to effectively defend himself, assistance from another inmate or a member of the prison's staff. *Wolff*, 418 U.S. at 562-72.

Department of Corrections policy which did not limit classification as a sex offender and required treatment to inmates convicted of sex offenses. *Id.* The consequence of failure to participate was a decrease in the amount of good time credit an inmate could earn. The court concluded the plaintiff had a liberty interest in not being labeled a sex offender and was entitled to procedural due process considering the loss of good time credit combined with the label carrying "inchoate stigmatization – here based on bare allegations which are vigorously denied and which have never been tested." *Chambers*, 205 F.3d at 1242. The court referenced then pending "Megan's law" legislation and the requirement that sex offenders register with law enforcement officials. *Id.* at 1242 n.13.

The Eleventh Circuit Court of Appeals focused primarily on the stigmatizing effect of the sex offender label in *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999) (per curiam). The plaintiff was serving a twenty (20) year sentence for attempted murder. *Id.* at 1288. He was classified as a sex offender based on information in his presentence report that he had two previous sex related charges: a rape charge had been "no billed" by the grand jury, and a sexual abuse charge was *nolle prossed* in the trial court. *Id.* Although participation in sex offender treatment programs was a prerequisite to parole eligibility and minimum custody classification, the Court concluded the Due Process Clause itself created a liberty interest based on the stigmatizing effect of being classified as a sex offender: "An inmate who has never been convicted of a sex crime is entitled to due process before the state declares him to be a sex offender." *Id.* at 1292. The court analogized the situation to that in *Vitek v. Jones*, 445 U.S. 480 (1995), where the

Supreme Court found "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." *Id.* at 494.

In *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004), *cert. denied*, 126 S. Ct. 427, 125 S. Ct. 1934 (2005), the Fifth Circuit Court of Appeals held a plaintiff who was required to register as a sex offender and attend sex offender therapy after being released on mandatory supervision was entitled to procedural due process protections. While on parole related to a burglary sentence, the state indicted the plaintiff for aggravated sexual assault of a child and indecency with a child by contact. *Id.* at 219. He pleaded guilty and was convicted of misdemeanor assault. *Id.* One month after the plaintiff was released on parole for the assault charge, the parole panel imposed additional sex offender conditions noted above. *Id.* The plaintiff registered as a sex offender but failed to participate in therapy which resulted in the revocation of his parole. *Id.* The court stated that, "due to its highly invasive nature, [the] sex offender therapy program is 'qualitatively different' from other conditions which may attend an inmate's release." *Coleman*, 395 F.3d at 223 (*citing Morissey v. Brewer*, 408 U.S. 471, 478 (1972) (discussing common parole conditions)). The court analogized the stigmatizing classification and treatment of the plaintiff with *Vitek*, 445 U.S. at 492, and concluded "the Due Process Clause, as interpreted in *Vitek*, provides [the plaintiff] with a liberty interest in freedom from the stigma and compelled treatment on which his parole

was conditioned, and the state was required to provide procedural protections before imposing such conditions." *Coleman*, 395 F.3d at 223.

In contrast to the decisions finding a liberty interest relative to sex offender classification and treatment, in *Grennier v. Frank*, 455 F.3d 442 (7th Cir. 2006), the Seventh Circuit Court of Appeals recognized the circuit court decisions outlined above but concluded a plaintiff who had not been convicted of a sex offense and was required to attend sex offender therapy did not have a protected liberty interest. *Id.* at 445. The plaintiff was serving a life sentence after being convicted of first-degree murder - details of the underlying offense indicate he murdered a teenaged hitchhiker, mutilated her body, and raped her corpse. *Id.* at 444. He sought to be released on parole but every request was denied on two bases: he had not been punished sufficiently, and the populace would not be safe with him at large unless he completed sex offender treatment. *Id.*

The court concluded Wisconsin's parole system regarding offenders serving life sentences did not create a liberty or property interest, and accordingly, the plaintiff had no entitlement to a due process hearing before being labeled a sex offender. *Id.* at 444. The court distinguished the situation from the cases finding a liberty interest attendant to sex offender labeling – concluding in those cases "[i]t was the liberty or property interest stemming from statutes and regulations, and not the 'sex offender' label alone, that required the hearing." *Grennier*, 453 F.3d at 445. *Grennier* looked to the Supreme Court decision in *Paul v. Davis*, 424 U.S. 693 (1976), citing the Court's holding "that the shame and humiliation of being

called a criminal is not enough by itself to require a hearing under the due process clause." *Id.* at 445. While recognizing that being called a sex offender is more serious than being called a shoplifter, the *Grennier* court concluded this distinction was not dispositive.

> The holding in *Paul* does not depend . . . on the degree to which the defamatory statement causes injury: the line is qualitative rather than quantitative. The Court held that a particular kind of government act (a public accusation of crime) does not affect a liberty or property interest. Only when the state goes further and makes a concrete decision that affects liberty or property (such as a rule that shoplifters cannot be public employees, or must spend time in prison) is a hearing essential.

Id. (citations omitted). Grennier held that because the plaintiff did not have a liberty or property interest in the prospect of parole under Wisconsin's system, the state did not need to afford him hearings on any of the subsidiary factual questions. 453 F.3d at 446.

Similarly, the Eighth Circuit Court of Appeals concluded a plaintiff who had been convicted of a non-sexual assault did not have a liberty interest in not being labeled a predatory offender in *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003). The court held the plaintiff's claimed loss of reputation was not enough: it must be coupled with some other tangible element to rise to the level of a protectible property interest. *Id.*

Our review of relevant cases from other circuits indicates the facts here are most analogous to those in

Grennier where the plaintiff was serving a life sentence and did not have a liberty interest in the prospect of parole. *Grennier*, 453 F.3d at 446. Here Plaintiff is serving life without parole so he has even less of a basis upon which to claim a liberty interest. While we agree with Plaintiff that language in some circuit decisions talks about the liberty interest attaching to simply being labeled a sex offender, *see, e.g., Kirby*, 195 F.3d at 1292, the finding of a liberty interest to which due process attached in each case was in combination with some other tangible deprivation. Because Plaintiff currently has no possibility of parole and he identifies no practical consequences of being classified as a possible sex offender within the prison other than alleged stigma attached, we conclude this is a case where Plaintiff does not have a liberty interest related to the sex offender classification at issue here. If Plaintiff's situation changes - for example if he becomes eligible for parole - a different case may be presented, but this type of speculation is not the province of a § 1983 action.[21]

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[21] Although we conclude Plaintiff has not made out a liberty interest Due Process claim based on his status or program assignment because of the lack of practical consequences of his decision not to participate in sex offender programming, we note that, given the shifting and somewhat conflicting legal landscape on this issue discussed in the text, prison administrators' review of the process attached to certain prescriptive requirements may be advisable. A cognizance of the *Wolff* due process protections and a proactive approach to the potential of altered legal requirements or changed factual circumstances only serve to avoid unnecessary litigation.

b. Liberty Interest in Compliance with Prison Policies

Plaintiff's additional assertion that the failure of prison authorities to follow their own rules is a violation of his Fourteenth Amendment Due Process rights (Doc. 66 at 12-14) is without merit. It is widely recognized that it is the federal standards of due process and not the procedural scheme set out in prison directives, guidelines or programs that give rise to a procedural due process claim. *See, e.g., Drayton v. Robinson*, 719 F.2d 1214, 1218-19 (3d Cir. 1983). In *Sandin*, the Supreme Court stressed that it is the nature of the deprivation, not the language of a particular regulation, that gives rise to a liberty interest -mandatory language in prisoner regulations do not confer rights of constitutional proportion on inmates absent the due process principles outlined above, *see supra* p. 616. *Sandin*, 515 U.S. at 481-84. Although a state law or prison directive may give rise to a state law liberty interest, and Fourteenth Amendment due process protections attach to a state law liberty interest, *see, e.g., Grandison v. Cuyler*, 774 F.2d 598, 602 (3d Cir. 1985), here Plaintiff identifies no such interest. Therefore, Plaintiff's argument that prison rules here give rise to a Due Process claim is without merit.

3. Equal Protection Claim

Plaintiff objects to the Report and Recommendation on the basis that the Magistrate Judge did not address his equal protection claim. (Doc. 52 at 14.)

To state a claim under the Equal Protection Clause

a plaintiff "must allege that he has been treated differently because of his membership in a suspect class or his exercise of a fundamental right, or that he has been treated differently from similarly situated others and that this differential treatment was not rationally related to a legitimate state interest." *Young v. New Sewickley Twp.*, 160 Fed.Appx. 263, 266 (3d Cir. 2005)(not precedential) (*citing City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). "A prisoner's vague and conclusoryallegations that his equal protection rights have been violated are insufficient to raise an equal protection claim." *Pedraza v. Meyer*, 919 F.2d 318, 319 n.1 (5th Cir. 1990).

Plaintiff's Equal Protection claim as set out in his Amended Complaint can only be described as a vague and conclusory allegation. (Doc. 29 at 6.) A review of his subsequent filings reveals that Plaintiff has failed to provide a substantive basis for this claim. Although he refers to a violation of 42 Pa. C.S.A.§ 9795.4, a failure to adhere to prison policies and guidelines relating to this statutory section, and violation of "Ex Post Facto laws" (Doc. 52 at 5) as bases for his equal protection claim, Plaintiff does not provide any information relating to the requirements of an Equal Protection violation.[22] Therefore, Plaintiff's equal

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[22] Plaintiff's referral to 42 Pa. C.S.A. § 9795.4 and related guidelines and policies is not germane to this action as the cited statutory section deals with the registration of sexual offenders and an assessment as to whether an individual should be classified as a sexually violent predator. *See* 42 Pa. C.S.A. §§ 9795.1, 9795.4. Nothing in this case implicates such a designation or assessment.

protection claim cannot provide a basis for his §1983 action and is properly dismissed.

4. Sex Offender Stigma

Plaintiff's next objection is that the Magistrate Judge did not address his claim relating to being stigmatized by being labeled a sex offender. (Doc. 52 at 9.) The constitutional implications of the sex offender label in Plaintiff's case have been thoroughly addressed in our procedural due process discussion.

5. Sixth Amendment Claim

Plaintiff's claim that the Magistrate Judge erred when he did not address Plaintiff's Sixth Amendment rights relates to the assertion that the Pennsylvania Supreme Court defines "assessment" as a criminal proceeding pursuant to "§ 9791 et seq." (Doc. 52 at 9.) Plaintiff also cites the procedure outlined in 42 Pa. C.S.A. §9795.4 as requirements in his case.

As noted above in the context of Plaintiff's Equal Protection claim, *see supra* n.6, the cited provisions refer to assessment and registration of an individual as a sexually violent predator. Such assessment and registration is not at issue here. Therefore, Plaintiff cannot sustain his Sixth Amendment claim on the asserted basis.

6. Eighth Amendment Claim

Plaintiff claims the Magistrate Judge erred in failing to consider Plaintiff's Eighth Amendment Claim in which he asserted that requiring sex offender programming amounted to cruel and unusual

punishment.

The Eighth Amendment's prohibition against cruel and unusual punishment "prohibits the wanton and unnecessary infliction of pain upon persons in custody." *Rhodes v. Robinson*, 612 F.2d 766, 771(3d Cir. 1979) (*citing Estelle v. Gamble*, 429 U.S. 97 (1976)). The Third Circuit Court of Appeals recognizes that emotional injury may give rise to an Eighth Amendment claim. *See Rhodes*, 612 F.2d at 772; *see also White v. Napolean*, 897 F.2d 103, 111 (3d Cir. 1990); *Metzger v. Osbeck*, 841 F.2d 518, 522-23 (3d Cir. 1988). To show an Eighth Amendment violation, a plaintiff must establish that the named government actor was aware that a substantial risk of serious harm existed and deliberately disregarded that risk. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The Circuit Court has explained that the critical element is not the nature of the plaintiff's injury but the manner in which it is afflicted. *See, e.g., Rhodes*, 612 F.2d at 772. Consistent with this principle, "where a person suffers injury as an incidental and unintended consequence of official actions, the abuse of power contemplated in the . . . eighth amendment cases does not arise." *Id.*

Considering all of Plaintiff's filings, we find no allegations which would give rise to an Eighth Amendment claim. Here Plaintiff's alleged emotional suffering is related to the requirement in his prescriptive plan that he attend sex offender programming. The record does not support Plaintiff's assertions that guilt has been adjudicated by prison officials, that he has been labeled a sex offender or that sanctions have been mandated. As discussed above, Plaintiff has not pointed to any sanction he has

suffered as a result of sex offender programming being part of his prescriptive plan or his refusal to participate in such programming. Given the background of Plaintiff's offense of conviction, SCI-Coal Township prison officials' determination that sex offender programming (beginning with assessment) should be part of Plaintiff's prescriptive plan cannot be considered an abuse of power or an awareness that a substantial risk of serious harm existed. Therefore, Plaintiff's Eighth Amendment claim is subject to dismissal.

7. Plaintiff's Challenge to the Underlying Conviction

Plaintiff alleges the Magistrate Judge erred in failing to acknowledge he is challenging the underlying conviction. (Doc. 52 at 11.) He avers that the information upon which prison officials relied in requiring sex offender programming is faulty and cannot be trusted for accuracy. (*Id.* at 11-12.)

We conclude this objection is without merit. Plaintiff's mere assertion that relied-upon facts are faulty does not undermine prison officials' reliance on them: as long as Plaintiff's conviction stands, prison officials are entitled to consider information related to his arrest and conviction.

C. PLAINTIFF'S LEAVE TO AMEND

In Plaintiff's Leave to Amend the Complaint (Doc. 73), he seeks to file a Second Amended Complaint (Doc. 73-3) adding additional defendants and claims based on the Ex Post Facto Clause, libel and slander to his original Amended Complaint (Doc. 29). For

reasons discussed below, we deny this motion.

Rule 15(a) of the Federal Rules of Civil Procedure states that leave to amend a complaint "shall be freely given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits in the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave should, as the rules require, be 'freely given.'

Id.; *see also Arthur v. Maersk, Inc.*, 434 F.3d 196, 202-03 (3d Cir.2006). The Court further explained that it is within the discretion of the district court to grant or deny the opportunity to amend, but the district court should explain a decision to refuse the amendment. *Id.* An amendment would be futile where the proposed amended complaint would not withstand a renewed motion to dismiss for failure to state a claim upon which relief may be granted. *In re NAHC, Inc. Securities Litig.*, 306 F.3d 1314, 1332 (3d Cir. 2002) (citation omitted); *Hollis-Arrington v. PHH Mortg. Corp.*, 205 Fed Appx. 48, 55 (3d Cir. 2006) (not precedential).

1. Ex Post Facto Claim

Plaintiff's Ex Post Facto Clause claim does not

present a basis to amend his complaint because it is not a claim upon which relief could be granted. In *Neal* and *Chambers*, the courts addressed Ex Post Facto claims where the inmate had not been convicted of a sex offense and was labeled a sex offender and required to participate in sex offender therapy based on laws, regulations or policies which became effective after the plaintiff was incarcerated. Both courts recognized the required two-pronged inquiry: first, the law must apply to events occurring before its enactment; and second, it must disadvantage the individual. *Chambers*, 205 F.3d at 1241; *Neal*, 131 F.3d at 825; *see also Richardson v. Pennsylvania Bd. of Probation and Parole*, 423 F.3d 282, 287-88 (3d Cir. 2005) (citation omitted). Concerning disadvantage, the court looks at whether the law has retroactively altered the definition of criminal conduct or increased punishment for the crime. *Chambers*, 204 F.3d at 1242 (*citing Lynce v. Mathis*, 519 U.S. 433 (1997)); *Neal*, 131 F.3d at 825 (*citing California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995)). "A speculated or attenuated possibility of increasing the measure of punishment is not enough." *Richardson*, 423 F.3d at 288 (citation omitted).

In *Neal*, the court considered the practical consequences attached to the sex offender label – loss of eligibility for furlough or favorable housing, and completion of SOTP as a precondition to parole eligibility – and concluded these were not disadvantages which give rise to an Ex Post Facto claim. 131 F.3d at 826. The court relied on *Kansas v. Hendricks*, 521 U.S. 346 (1997), where the Supreme Court held that a law which allowed for the involuntary commitment of an inmate deemed a sexually violent predator past the time to which the

inmate had been sentenced did not violate the Ex Post Facto Clause. *Id.* at 826-27. The act in question did not require a criminal conviction as a prerequisite for involuntary commitment, a fact which led the Court to conclude "[a]n absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed." *Hendricks*, 521 U.S. at 362. The Court further concluded that because the "Act does not impose punishment, it does not raise ex post facto concerns." *Id.* at 371. Following the analysis of *Hendricks*, *Neal* reasoned "[b]ecause the Supreme Court has held that such mandatory treatment programs [as SOTP] following an inmate's classification as a sex offender based on conduct which occurred prior to the programs' beginning do not violate the Ex Post Facto Clause, summary judgment for the defendants on the inmates' ex post facto clause was appropriate." *Neal*, 131 F.3d at 827.

As discussed above, here the practical consequences of the provisions under which prison officials seek to have Plaintiff participate in SOTP are less than those in *Neal*. Plaintiff's claim would fail the second prong of the Ex Post Facto inquiry as the plaintiff in *Neal* was more disadvantaged than Plaintiff here. Keeping in mind we are not to consider any speculative or attenuated consequences Plaintiff might assert relative to required SOTP participation – e.g., future impact on Plaintiff's ongoing challenge to his conviction (Doc. 52 at 8; Doc. 66 at 16) – there is no basis upon which to conclude he could succeed on this amendment to his Complaint.

Chambers approached the Ex Post Facto claim from a different perspective. The court first noted the plaintiff's punishment was not increased because he

possessed no vested interest in a particular parole date or parole hearing eligibility date and the SOTP did not criminalize conduct that was legal before its passage. 205 F.3d at 1242. *Chambers* further noted "in rehabilitative matters, prison officials may consider any history established in the inmate's record which it may determine requires treatment." *Id.* Thus, "because application of the SOTP did not affect the legal consequences of his crime or increase his punishment, there is no *ex post facto* violation." *Id.* (internal quotation omitted).

Here Plaintiff's record contained information about his underlying conviction which led prison officials to determine he may require sex offender treatment. Plaintiff's punishment has not been increased and the legal consequences of his crime have not been affected in any way which would distinguish his case from *Chambers* or *Neal*. Therefore, further amendment of his Amended Complaint (Doc. 29) to include an Ex Post Facto claim would not present a claim upon which relief could be granted, thus rendering any such amendment futile.

2. Libel and Slander Claims

Plaintiff also seeks to file a Second Amended Complaint on the basis of alleged libel and slander on the part of prison officials. (Doc. 73.) The basis of this proposed amendment is a notation on a document submitted by Defendants in support of their motion. (Doc.63-2 Ex. A-6 p. 2.) The document is a letter from Plaintiff to "Mr. Stevens" dated June 17, 2005, in which he explains that he is not a "denier" for purposes of sex offender treatment; rather, he is innocent as he has never been accused of any sex

charge and should not be required to attend the treatment program. (*Id.*) The following notation is found at the bottom of the correspondence:" Murder, rape, bite on nipple cut off to disguise irregular tooth pattern. as per Williams CCII 06/20/05." (*Id.*) It is the rape notation to which Plaintiff vigorously objects. (Doc. 74 at 4.)

Looking at Plaintiff's claim from a federal law perspective, some courts have recognized a federal cause of action in a due process expungement claim where a prisoner seeks to have allegedly false information removed from his record. *See Paine v. Baker*, 595 F.2d 197 (4th Cir. 1979). Although the ongoing validity of *Paine* has been questioned, *see Johnson v. Rodriguez*, 110 F.3d 299, 309 n.13 (5th Cir. 1997), the Third Circuit Court of Appeals recently reviewed such a claim in *Reynolds v. Williamson*, 197 Fed.Appx. 196, 199 (3d Cir. 2006) (not precedential). *Reynolds* recognized that *Paine* held "a state prisoner has a federal due process right to have 'prejudicial erroneous information expunged from [his] prison files' where he shows that: (1) the information is in his file, (2) the information is false, and (3) the information is relied upon to a constitutionally significant degree." *Reynolds*, 197 Fed. Appx. at 199 (*quoting Paine*, 595 F.2d at 201-02). *Reynolds* noted the Third Circuit has not decided whether to endorse the right of expungement announced in *Paine* and denied the plaintiff's claim on the *arguendo* assumption that such aright exists. *Id.*

Here any federal claim based upon the information identified by Plaintiff – the notation concerning rape – would fail on the third *Paine* requirement. First, Plaintiff has not shown any reliance on the notation

cited. Moreover, as discussed above, Plaintiff has shown no constitutional deprivation based upon being labeled a sex offender within the prison or being required to attend SOTP. Therefore, any information in his file that may have contributed to the decision to so label Plaintiff or require SOTP cannot have been relied on to a constitutionally significant degree. Based on this analysis, even if the Third Circuit were to recognize the right announced in *Paine*, Plaintiff has failed to state a claim upon which relief could be granted. As discussed above, it would be futile to allow an amendment of the complaint to include a meritless claim.

Finally, to the extent Plaintiff is proposing amendment based on state law claims for libel and slander, the Court chooses not to exercise supplemental jurisdiction. It is proper to decline to exercise supplemental jurisdiction over state law claims if the court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Because we find no merit in Plaintiff's federal claims – the claims over which we have original jurisdiction – we will not allow amendment of Plaintiff's Complaint to include state law claims.

III. Conclusion

For the reasons discussed above, we deny Plaintiff's Leave to Amend the Complaint (Doc. 73). Therefore, our consideration of whether summary judgment is proper is focused on Plaintiff's Amended Complaint (Doc. 29) – the subject of the Magistrate Judge's Report and Recommendation (Doc. 51) and the bulk of the filings in this case.

Based on the foregoing discussion, Plaintiff's objections to the Report and Recommendation (Doc. 52) provide no basis upon which to proceed with his 42 U.S.C. § 1983 action. Therefore, summary judgment in favor of Defendants on Plaintiff's claims brought pursuant to this cause of action is appropriate. As Plaintiff has not come forward with any other viable cause of action in his Amended Complaint (Doc. 29), dismissal of this complaint is warranted. With this conclusion, we adopt the Magistrate Judge's Report and Recommendation (Doc. 51) as modified. Defendant's Motion to Dismiss the Amended Complaint (Doc. 39), converted to a motion for summary judgment pursuant to the Court's Order of June 6, 2007, (Doc. 65) is granted.

We construe Plaintiff's Motion to Strike his Second Amended Complaint (Doc. 71) as a motion to withdraw his request for Leave to Amend the Complaint (Doc. 67) and grant the motion. (*See supra* n.1.) Therefore, Plaintiff's Leave to Amend the Complaint (Doc.67) is deemed withdrawn.

An appropriate Order follows

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: July 26, 2007

[CAPTION OMITTED IN REPRINTING]

ORDER

AND NOW, THIS 26th DAY OF JULY 2007, FOR THE REASONS DISCUSSED IN THE ACCOMPANYING MEMORANDUM, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Leave to Amend the Complaint (Doc. 73) is DENIED;

2. The Magistrate Judge's Report and Recommendation (Doc. 51) is adopted as modified;

3. Defendant's Motion to Dismiss the Amended Complaint (Doc.39), converted to a motion for summary judgment pursuant to the Court's Order of June 6, 2007, (Doc. 65) is GRANTED;

4. Plaintiff's Motion to Strike his Second Amended Complaint (Doc. 71) is construed as a motion to withdraw his request for Leave to Amend the Complaint (Doc. 67) and is GRANTED;

5. Plaintiff's Leave to Amend the Complaint (Doc. 67) is DEEMED WITHDRAWN;

6. The Clerk of Court is directed to close this case.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

Section 11 - Sex Offender Treatment (SOT)

A. Standards, Guidelines, and Theoretical Orientation for the Assessment and Treatment of Adult Sex Offenders

1. Standards and Guidelines

The Department's **Standards and Guidelines for the Assessment, Evaluation and Treatment of Adult Sex Offenders** are found in **Attachment 11-A**. Every provider of sex offender-specific treatment shall thoroughly familiarize himself/herself with these prior to facilitating treatment.

2. Theoretical Orientation

The theoretical orientation of the Department is derived from the current thinking in the field of SOT, the standards and practices of the Association for the Treatment of Sexual Abusers (ATSA), the Pennsylvania Sex Offenders Assessment Board (SOAB), and the Sex Offender Treatment Programs (SOTP) operating in other state correctional jurisdictions and agencies. All program components and therapeutic strategies are based on an evidenced-based, cognitive behavioral model.

Social learning theory supports the principle that cognitive processes mediate environmental and experiential events; that social learning

experiences influence how an offender thinks about himself/herself and his/her world and that his/her thinking, in turn, influences how he/she perceives and reacts to his/her environment. This perspective is a basic tenet of the Department's SOTP. Further discussion of the **Theoretical Orientation** upon which the SOTP is based is presented in **Attachment 11-**

B. **Risk/Need Assessment**

1. Assessment Strategy

a. An **Adjusted Actuarial Approach** shall be employed in evaluating sexual offenders. This strategy, involving first the use of a validated sex offender risk instrument that measures static or unchangeable risk factors shall be adjusted based on an analysis of the inmate's dynamic changeable risk factors.

b. Risk assessment should be updated as an inmate's dynamic risk factors change, minimally post-treatment and (if different) at time of parole review.

c. When the inmate's reentry into the community is being considered, reports to the Pennsylvania Board of Probation and Parole (PBPP) should specify the offender's dynamic risk factors that are more acute in nature (those that have a stronger temporal association with re-offending and/or those that may change rapidly), such as negative mood or intoxication, as these may be more

amenable to observation by supervising officers and service providers, and may indicate that risk has increased such that offending is more imminent than it was previously.

2. Facility Responsibilities

   a. Permanent facilities are responsible for identifying, tracking and assessing all sexual offenders received. All facilities shall use the automated Unit Management system for recommending Sex Offender Programs and maintaining waiting lists. A trained SOT provider shall conduct specialized assessments of a sexual offender within two months of his/her arrival at the facility, and, subsequent to the assessment, ensure the appropriate program is placed on the offender's Correctional Plan.

   b. Participation in sex offender-specific treatment shall be "minimum sentence-driven," with an offender closest to his/her minimum date taking priority over those further from his/her minimum sentence date. However, this is not to say that lifers and/or offenders with very long sentences shall not be afforded treatment. Whenever possible (when it would not take a slot needed for an offender two years within his/her minimum date), these offenders shall be considered for placement in treatment.

3. Informed Consent

Prior to initiating an interview for the purpose of initial risk assessment, the evaluator shall explain the nature, scope and purpose of the interview to the inmate, emphasizing its importance in determining treatment needs. The **DC-484, Mental Health Informed Consent** form **(Attachment 2-K)** shall be completed in accordance with **Section 2, Delivery of Mental Health Services, Subsection** F. of this procedures manual.

4. Assessment protocol for an inmate offender with a current sex offense

   a. Every offender (received subsequent to the effective date of this procedure) currently incarcerated for a sex offense shall be assessed for level of risk within two months of arrival at the permanent facility. (Staff are not expected to retroactively complete risk assessments on an inmate incarcerated prior to the effective date of this procedure.) The inmate will eventually have to be assessed for risk level, but this can be done at the time the staff member is ready to initiate a new group.

   b. For every male sexual offender, assessment shall include, but not be limited to, a case file review, and completion of the *Static-99* **(Attachment 11-C, Static-99 Coding Rules Revised and can also be found online at www.sgc.gc.ca)**. Unless the convicted sexual offender refuses, an individual interview shall also be part of the assessment process,

and during the interview the DC-577, Adult **Sex Offender Data Collection Instrument (Attachment 11-D)** shall be completed. Note: Much of the information required for completion of the DC-577 can be gleaned through the case file review, but can be verified and/or clarified in the individual interview. The same assessment process shall occur with every convicted female sexual offender, excluding the completion of the *Static 99* as this risk assessment tool has not been cross-validated with this population.

c. Every inmate refusal to be interviewed for purposes of risk assessment shall be documented using the **DC-14, Cumulative Adjustment Record** form, and this documentation shall be sent to the inmate's Corrections Counselor for maintenance in the DC-14 file, with a copy maintained in the offender's sex offender-specific record. Upon refusal, the inmate shall be counseled as to the possible consequences of failure to participate in treatment, including the possibility of being denied parole and of increasing his/her chances of re-offending upon return to the community. In cases where the inmate is appealing his/her case based upon claim of innocence and/or is in total denial of the crime(s) and refusing treatment, this shall also be documented using the DC-14.

d. Once the *Static 99* and the DC-577 (Attachment 11-D) have been completed, the

treatment provider (in the case of the male sex offender) shall determine if the risk level gleaned from the *Static-99* is to be adjusted based upon the following static and dynamic risk factors that have been empirically linked to increased risk of sexual recidivism.

(1) indication that the offender is at high risk for general recidivism based on Level of Services Inventory - Revised (LSI-R) scores (if available);

(2) indication that the offender maintains attitudes that support sexual offending (articulates belief that children are not harmed by sexual activity with adults);

(3) indication that the offender has a primary sexual attraction to children and/or becomes sexually aroused by violence;

(4) indication that the inmate has engaged in a high degree of deviant sexual behavior rather than appropriate sexual behavior;

(5) indication based on historical data or behavioral observations that the inmate has serious emotion management/impulsivity problems;

(6) indication that the inmate has significant history of conflict-ridden intimate relationships; and/or

(7) documented evidence of early onset sexual offending behavior.

e. In the case of the female sexual offender, the treatment provider shall determine the level of risk based upon the case file review, the individual interview using the **DC-577 (Attachment 11-D)** and the presence (or absence) of the above-cited dynamic risk variables.

f. In making decisions to adjust the risk level obtained from the *Static 99* based upon identification of the above-cited static and dynamic risk factors, the following guidelines apply:

(1) *Static 99* scores translated into Low and Low-Moderate risk categories shall be adjusted upward (Moderate/High Risk) in cases where the presence of the stable dynamic risk factor (3) (deviant arousal) is confidently identified. (There should be documented evidence of a pattern of deviant behavior as evidenced by multiple offenses and/or victims over an extended period of time.)

(2) *Static 99* scores translated into Low and Low-Moderate risk categories shall be adjusted upward (Moderate/High Risk) in cases where four or more of the risk factors (1) through (7) are confidently identified.

g. Every inmate who refuses assessment and/or treatment shall be identified as falling in the Moderate/High risk category. In the event that the inmate does not self-refer (via written or verbal request) to treatment within a period of one year, the Corrections Counselor shall ensure that he/she is again counseled regarding the possible consequences of failure to participate in treatment at the time of his/her annual review. In the event that an inmate does self-refer for treatment, a risk assessment shall then be completed.

h. The results of the sex offender assessment shall be summarized using the DC-578, Sex **Offender Program Evaluation** form **(Attachment 11- E)**, which provides two levels of risk (Low, Moderate/High). A male offender assessed to be low risk shall be prescribed Low Intensity SOTP, while an offender assessed to be moderate or high risk shall be prescribed Moderate/High Intensity SOTP. Assessment results (including copies of the completed *Static 99*, DC-577 **(Attachment 11-D)** and the DC-578 **(Attachment 11- E)**, along with copies of the inmate's Pre-Sentence Investigation (PSI), and any existing police reports and/or victim statements shall be the beginning of the sex offender-specific record. Copies of the completed DC-578 **(Attachment 11- E)** shall be distributed to the inmate's Corrections Counselor and the Facility Parole Agent.

5. Assessment Protocol for a Technical Parole Violator

When a ***male*** inmate convicted of a sexual offense (previously a successful completer of sex offender-specific treatment) fails on conditional release and is returned to prison as a parole violator, decisions about what level to return him to treatment shall be based in the following assessment protocol:

a. Following completion of a case file review and the *Static 99* (if not accessible from prior records), the **Table for Adjustments in Risk Based on Time Free (Attachment 11-F)** shall be used to determine risk of sexual re-offense. Guidelines for recommendations based upon the results of this procedure are as follows:

(1) In cases where the risk (of sexual recidivism) is less than 12% over a 10-year post-release follow-up period, placement in a Maintenance group shall be recommended, unless the behavior leading to revocation of parole signified imminent re-offense (the parolee was caught taking a nine-year old boy he had befriended at a mall over the state line), in which case the Moderate/High Intensity Program shall be recommended.

(2) In cases where the risk is found to be between 12% and 20% over a 10-year

post-release follow-up period, the Low Intensity Program shall be recommended, again, unless the behavior leading to revocation of parole signified imminent re-offense, in which case the Moderate/High Intensity Program shall be recommended

(3) In cases where the risk is found to be greater than 20% over a 10-year post-release follow-up, the Moderate-High Intensity Program shall be recommended.

b. Assessment results for technical parole violators shall be documented using the **Assessment Results for Inmates Referred for Evaluation for Sex Offender Treatment due to a Technical Parole Violation or a Prior Sex Offense (Attachment 11-G)**. Copies of this shall be distributed to the Facility Parole Agent and the Corrections Counselor.

6. Assessment of a Convicted Parole Violator

a. A convicted Parole Violator, re-incarcerated due to sexual recidivism shall be evaluated as described in **Subsection B. 4**. above, using the most recent sex offense as the index offense. Results of the evaluation, along with the programming recommendation shall be summarized using the **DC-578 (Attachment 11-E)** with copies distributed to the Corrections Counselor and the Facility Parole Agent.

b. A convicted Parole Violator, re-incarcerated due to non-sexual recidivism shall be evaluated as described in **Subsection B. 4.** above (using the prior sex offense as the index offense, scoring the *Static 99* retrospectively if not available in prior records, and adjusting, if indicated, as described in **Subsection B. 4.**). This includes the parole violator who was on parole for a non-sexual offense, but has been referred for an evaluation because of a prior sex offense, providing the prior sex offense occurred within 10 years of the current offense. Results of the evaluation and the programming recommendation shall be summarized using the **DC-578 (Attachment 11-E)** with copies distributed to the Corrections Counselor and the Facility Parole Agent.

7. Assessment of a ***male*** inmate referred for evaluation by the Corrections Counselor and/or the PBPP due to a prior sex offense who was not on parole at the time of the current, non-sex offense.

   a. In the case of an inmate who was not on parole at the time he committed the nonviolent offense for which he is currently incarcerated, the protocol described in **Subsection B. 5.** above shall be implemented, in this case recommending the "no treatment" option if the **Table for Adjustment in Risk Based on Time Free (Attachment 11-F)** yields a sexual re-offense

risk less than 12% over a 10-year post-release follow up period. Results of the evaluation and the programming recommendation shall be reported on the **Assessment Results for Inmates Referred for Evaluation for Sex Offender Treatment Due to a Technical Parole Violation or a Prior Sex Offense** form **(Attachment 11-G)**, with copies distributed to the Corrections Counselor and Facility Parole Agent.

b. In the case of an inmate who was not on parole at the time he/she committed the violent offense for which he/she is currently incarcerated, the risk assessment protocol described in **Subsection B. 4.** above, using the prior sex offense, provided it did not occur more than 10 years prior to the current offense, as the index offense and scoring the *Static 99* retrospectively. Results of the evaluation and the programming recommendation shall be reported on the **DC-578 (Attachment 11-E)**, with copies distributed to the Corrections Counselor and Facility Parole Agent.

c. In cases where the inmate had been offense-free in the community 10 or more consecutive years prior to the current non-sexual, non-violent or non-sexual, violent offense, the *Static 99* shall not be completed and a "no treatment" recommendation shall be made. This recommendation shall be made using the **Assessment Results for Inmates Referred for Evaluation for Sex Offender Treatment** due to a Technical

Parole Violation or a Prior Sex Offense form (Attachment 11-G), with copies distributed to the Corrections Counselor and the Facility Parole Agent.

C. Sex Offender Treatment (SOT) Programming

1. Standardized Treatment Model

a. A program of sex offender-specific treatment is made available to every inmate convicted of a sexual offense, and in cases where specialized assessment indicates, treatment shall also be made available to an inmate who has a history of prior sexual offenses.

b. Every facility that offers sex offender-specific treatment shall use the *"Responsible Living: A Sex Offender Treatment Program."* The program shall be implemented as written using the "Group Only" format and the "Point System."

c. Initially, a denier shall be accepted into the program, but he/she shall be re-evaluated at intervals specified by the program, and ultimately terminated if satisfactory progress is not evidenced. No more than 20% of the initial group composition shall consist of deniers.

d. Per Julie Medlin, Ph.D., the program developer, order of presentation of the seven treatment phases need not necessarily be

fixed, and therefore facilities are afforded flexibility about the order of presentation, at least until such time as experience demonstrates clear superiority of one order over another. Programming shall be standardized with respect to content and, to a lesser extent, process, with refinements and/or modifications occurring over time based upon our experience, new research and related changes in general practice. Any/All refinement and/or modification of programming must initially be approved through the SOT Committee. If approved, any changes shall be incorporated into written procedure before implementation in the field is expected.

e. Point System - Program participants must accrue 85% of the total possible points in order to "graduate" from the program. (Note: The total number of possible points may vary as a function of several factors, including group size and the speed at which the facilitator(s) is able to work through the material.)

(1) Using the "Group Only" format, each participant shall be able to accrue a total of six points per session, two for attendance, two for participation in the group session, and two for completion of the week's homework assignment.

(2) A participant may be given a score of one rather than a score of two for

participation and/or homework completion, if the group facilitator finds either or both marginal rather than satisfactory.

(3) A participant can accrue 10 points upon completion of the "Major Project" associated with each phase of the program. In order to accrue all 10 points, the quality of the participant's work shall be excellent. Nine points are awarded for good work, and eight for satisfactory work. If the facilitator does not find the participant's Major Project worthy of at least an "eight," the work shall not be accepted and the offender shall be advised of the reasons for rejection and performance expectations, and asked to re-submit the project after revisions have been completed.

(4) A program participant shall be issued a completed Points Update form (located on page 96 of the "*Getting Started*" facilitator's manual) at the completion of each treatment phase. The treatment provider shall complete Points Updates along with the Therapist's Ratings on Treatment Goals form (located at the end of the facilitator's manual for each phase), which also shall be given to the program participant.

(5) At this time, a program participant

shall also complete the Self Rating on Treatment Goals and Review of Progress on Treatment Goals forms (located at the end of the facilitator's manual for each phase), and shall submit these to the treatment provider. This exchange of assessments shall permit the program participant, as well as the therapist, opportunity to check the extent to which the program participant's ratings agree with the treatment provider's. The treatment provider shall ensure that copies of Points Update, Therapist's Ratings on Treatment Goals, Self Rating on Treatment Goals and Review of Progress on Treatment Goals forms are maintained in the sex offender-specific treatment record.

f. Modifications For Correctional Setting - Use of Phallometry and Polygraphy as outlined in *Responsible Living* shall be omitted due to unavailability of equipment and trained personnel. Aversive therapy techniques requiring use of ammonia shall also be omitted, and a written script shall be required instead of audiotapes for the Major Project (Covert Sensitization) in the Behavioral Techniques phase. Showing of the movie *Shadowlands* (Sex Education Phase) will be initiated once the film is made available through the Director of SOT.

g. Procedure for implementing completion of

the Major Project for the Victim Empathy Phase of *Responsible Living: Victim Scrapbook* - completing this project requires that the inmate create a series of collages depicting victim impact. **Procedure for Implementing Victim Scrapbook (Attachment 11-H)** outlines a procedure for managing the materials necessary to complete the collage.

h. A Moderate-High and High Risk offender, as assessed by the assessment protocol outlined in **Subsection B.** above shall receive all seven phases of *Responsible Living: A Sex Offender Treatment Program*.

i. A Low and Low-Moderate Risk offender, as assessed by the assessment protocol outlined in **Subsection B.** above shall receive *Responsibility Taking, Sex Education and Relapse Prevention* phases.

j. Special Populations - *Responsible Living: A Sex Offender Treatment Program* was designed for the male sexual offender and therefore programs for female sexual offenders may be modified as needed. Treatment for a Special Needs inmate (includes Mental Retardation/ Developmental Disability, Mental Illness, and/or physical disability such as deafness) and a Hispanic sexual offender may also be modified accordingly, with modifications based upon field research and findings pertaining to best practices for these

populations of sex offenders. These programs shall be reviewed and approved through the Sex Offender Treatment Committee (SOTC). Staff members may submit recommendations for SOTC review to the Director of SOT who will ensure these are placed on the next meeting's agenda.

2. Treatment Variables

Group therapy with sex offenders is viewed as the treatment modality of choice. It is cost effective in that a maximum number of clients receive treatment with the use of minimal resources. Given skilled clinicians, the group therapy experience can be very powerful.

a. Group size - Group size shall be limited to not more than 15 participants.

b. Group composition - Treatment teams may make decisions regarding whether to separate offenders based upon the nature of their offense (aggressive/violent vs. manipulative-coercive) or the age of victims (child vs. adult), or rather combine offenders with a variety of offenses and types of victims. Group composition is left to the discretion of the treatment team until such time as research reveals data indicating one type of group composition is superior to the other with regard to treatment outcome, at which time the committee shall disseminate the recommended group composition.

c. Group process - Any ongoing group is in a continuous process of development. There have been several models outlining group development. A 4-stage model of group development summarizing the work of Corey (1995) can be found in **Attachment 11-I.**

d. Getting Started - Documents explaining the **DC-580, Limits of Confidentiality (Attachment 11- J)** and **Conditions of Participation (Attachment 11-K)** should be thoroughly reviewed, and signed by the inmate and witnessed prior to the inmate's involvement in programming.

e. Levels of Treatment and Adding Group Participants

(1) *Responsible Living: A Sex Offender Treatment Program*, as it is implemented for a sexual offender whose level of risk and need fall into moderate and high categories, consists of seven treatment phases. Once a treatment phase has been initiated, the group composition is "set" and no new group members shall be added. At the discretion of the treatment team, new members may be added when a new treatment phase is initiated. However, such decisions should be carefully considered and based upon the treatment team's assessment of the impact of these variables on the group and each participant. Close and

accurate record keeping shall be very important in managing changes in group composition as well as variations in the sequential ordering of individual participant's progression through the seven treatment modules.

(2) *Responsible Living: A Sex Offender Treatment Program,* as it is implemented for low risk offenders, shall generally be a "closed" group. That is, once the group composition is decided upon and the program is initiated, no new group members shall be added. The only exception to this shall be the case in which attrition has resulted in a Low Intensity group consisting of fewer than five program participants. In such case, this group may be joined with another Low Intensity group at the onset of a new treatment phase, provided the resulting larger group could ultimately complete the entire Low Intensity Program concurrently.

f. Frequency/Duration - Group sessions shall be conducted weekly for two consecutive hours. Although the total target time to complete the program as it is implemented for moderate and high risk/need level participants is approximately two years, the overall number of sessions required shall be determined by the rate of the group's progress through the required components. The total target time to complete the

program as it is implemented for low risk offenders is approximately eight months; however, this also shall be a function of the group's rate of progress through the program material.

g. Facilitation - Groups may be co-facilitated depending upon availability of staff resources. Given availability of adequate resources, co-facilitation by male-female pairs is optimal and recommended.

h. Responsivity Issues - An adult learns in a variety of ways using a variety of teaching techniques. These techniques comprise the most effective methods of incorporating his/her emotional, physical, intellectual and social characteristics into the learning process. For the treatment process to foster a learning climate, treatment providers need to be aware of the **Principles of Adult Learning (Attachment 11-L)**.

D. **Staff Qualifications and Minimum Training**

Qualifications and training requirements shall be as consistent as possible, given staffing patterns, with those standards outlined by the ATSA.

1. Credentialing and Supervision

a. Staff who possess a graduate degree in the behavioral, health, or social sciences that had been regularly providing sex offender-specific treatment for at least two years

prior to the issuing of this policy shall be considered "credentialed" providers. Staff who do not possess a graduate degree in the behavioral, health or social sciences shall be considered credentialed providers in cases where he/she possesses a Bachelors Degree or equivalent, in the Behavioral and Social Sciences, and are able to document a minimum of 2,000 hours of face-to-face clinical contact with sexual offenders. Face-to-face clinical contact includes group and individual contacts including contacts for the purpose of assessment. The Licensed Psychologist Manager (LPM) shall be responsible for maintaining a complete list of credentialed providers, and for tracking provider's face-to-face clinical contact hours, updating these annually. Each provider shall be responsible for tracking his/her hours of face-to-face clinical contact and submitting these to the LPM annually.

b. A credentialed provider may provide clinical supervision to any provider who does not meet the criteria for credentialing. Supervision may occur through co-facilitation of groups and/or sessions. Supervision may occur individually or in groups and should consist of weekly sessions, affording the supervisee(s) opportunity to review and discuss any concerns related to group process and/or problematic cases.

2. Training

a. Education, experience and training, and NOT job classification, are the critical qualifications associated with the provision of SOT.

b. Any/All new providers (providers beginning work subsequent to the effective date of this procedure) of SOT shall complete the *Fundamentals of Sex Offender Treatment* training offered through the Department's Training Academy within ***six months*** of beginning to treat sexual offenders.

c. Any SOT provider must complete the Fundamentals of Sex Offender Treatment training within six months of the effective date of this policy if he/she has not completed coursework or training in the following areas:

(1) assessment (including risk assessment);

(2) psychopathology;

(3) counseling and psychotherapy;

(4) Cognitive Therapy;

(5) Megan's Law;

(6) relapse prevention;

(7) sexual arousal control;

(8) relationship and social skills training;

(9) victim awareness and empathy; and

(10) pharmacological therapy.

d. Every provider should obtain at least nine hours annually of continuing education in the field of sexual abuse. Continuing education includes courses, conferences, workshops, and other training experiences including self-directed literature review. A provider may request out-service trainings through his/her facility administrators. A provider may also take advantage of trainings made available by the SOAB. These six-hour trainings are typically offered quarterly and free of charge.

3. Consultation and professional affiliations

a. Providers, regardless of degree and years of experience in the field of sexual abuse, should supplement his/her education and professional experience with informal consultation with other providers of SOT in the Department.

b. Providers should consider affiliations with other professional organizations, agencies, or groups involved in the assessment, treatment and management of sexual abusers.

c. Each facility shall ensure that at least one sex offender treatment provider maintains membership in the ATSA.

d. Every provider should make a good faith effort to remain informed of all applicable statutory and regulatory requirements to warn, report, and notify the appropriate persons or entities of information learned during the course of providing clinical services. The Director of SOT shall periodically provide information as it becomes available.

E. Multidisciplinary Treatment and Management of the Sex Offender

The Department supports a multidisciplinary approach to the treatment and management of sex offenders. A variety of professionals including, but not limited to, Corrections Counselors, Psychologists, Psychiatrists, Unit Managers, and Corrections Officers shall be involved in the treatment and management of sex offenders.

Every staff member involved in the treatment and management of sex offenders will be come familiar with the cognitive distortions or "thinking errors" commonly used by sex offenders, as this may assist in therapeutic confrontations and/or monitoring the extent to which the offender is internalizing and practicing pro-social attitudes and behaviors addressed in the group treatment setting.

1. Counselors

a. The Corrections Counselor shall be the primary case manager for the sexual offender, ensuring he/she has been identified, has completed his/her risk/needs

assessment, and has either been placed in programming subsequent to this assessment, or, if necessary, been placed on a waiting list for future involvement in programming. Corrections Counselors shall use the DC-97, **Psychology Referral Form** to refer every newly received sexual offender, including those with prior but not instant sex offenses, to the LPM for risk assessment.

b. Given the appropriate level of education, training, and experience, and, if indicated, clinical supervision, Corrections Counselors may also complete assessments and conduct group treatment with sex offenders, completing the DC-578 (Attachment 11-E) and progress reports, when indicated (inmate is in need of an assessment, inmate is being reviewed for parole, inmate has successfully completed programming).

2. Psychologists

The LPM/designee shall coordinate and oversee the SOT in each facility. Given the appropriate level of training, experience, and, if indicated, supervision, Psychologists, Psychological Services Specialists (PSSs) and Psychological Service Associates (PSAs) may conduct group treatment with sex offenders. They may also conduct assessments for programming needs, parole, commutation, or other purposes. For sex offenders who are also placed on the Mental Health/Mental Retardation (MH/MR) tracking roster(s), the psychology staff shall ensure that

the inmate's Individual Treatment Plan (ITP) addresses sex offender assessment and treatment needs

3. Psychiatrists

   A Psychiatrist shall treat those sex offenders with co-existing Mental Health problems, and on rare occasion may attempt to treat the sex offender's deviant sexual arousal or extreme sexual compulsivity using anti-androgens and/or Selective Serotonin Reuptake Inhibitors (SSRIs).

4. Unit Managers

   a. Particularly when managing a Residential Sex Offender Unit or a Therapeutic Community for sex offenders, the Unit Manager shall become involved in the monitoring and, in some cases, tracking of progress of offenders on his/her Housing Unit.

   b. Given the appropriate level of education, training, experience and, when indicated, clinical supervision, a Unit Manager may also become involved in the assessment and treatment of sex offenders.

5. Drug and Alcohol Treatment Specialists (DATS)

   a. Particularly when maintaining an office with a Residential Sex Offender Unit or a Therapeutic Community for sex offenders, the DATS shall become involved in the

monitoring and, in some cases, tracking of progress of offenders on his/her housing unit.

b. Given the appropriate level of education, training, experience, and, when indicated, clinical supervision, a DATS may also become involved in the assessment and treatment of sex offenders.

6. Corrections Officers

a. Particularly when posted on a Residential Sex Offender Unit or a Therapeutic Community for sex offenders, Corrections Officers can become involved in the tracking and monitoring of the offender's progress in treatment. Because an Officer tends to observe the inmates more than the treatment providers in settings outside of groups, he/she can be an invaluable source of information with regard to gauging the extent to which there is "transfer of learning" outside the group setting.

b. Every Corrections Officer assigned to a Residential Sex Offender Unit or a Therapeutic Community for sex offenders shall complete Day 1 of the Fundamentals of Sex Offender Treatment training within six months of his/her assignment to the post.

F. Record Keeping

Record keeping is essential to maintaining documentation of offense-related data, risk

assessments, program participation, progress in treatment, relapse prevention plans and successful program completion. Good record keeping assists the provider in remaining organized and provides a handy resource for those working with large numbers of program participants.

1. A file shall be developed for all inmate program participants. This file shall be a separate file developed and securely maintained by the treatment provider solely for maintenance of documents associated with sex offender-specific treatment.

2. Original and/or copies of all documents associated with and generated by assessment and treatment staff shall be maintained in the inmate program participant's file. As the participant progresses in treatment, record of his/her program evaluation, group attendance, completed homework assignments, major project completion, Self Ratings on Treatment Goals, Therapist's Ratings on Treatment Goals, Review of Progress of Treatment Goals, Points Updates, adjunctive individual sessions and progress reports shall be added to the file. Any existing psychological and/or psychiatric evaluations shall also be incorporated.

3. Excluding the **DC-579, Summary of Progress in Sex Offender Treatment** form **(Attachment 11-M)**, official documents (those identified with a Department number) generated through treatment shall be copied and distributed to the Corrections *Counselor* and Facility Parole Agent. The **DC-579 (Attachment 11-M)** shall be

completed by the treatment provider prior to the offender's parole review and shall be copied and submitted to the PBPP along with the offender's Pennsylvania Clinical Risk Assessment (P-CRA). The original DC-579 (Attachment 11-M) document shall be filed in the Medical Record, with copies distributed to the Corrections Counselor and Facility Parole Agent. In cases of successful program completers, a copy of the DC-579 shall also be given to the inmate, and he/she shall be instructed to provide this summary to his/her outpatient provider of sex offender-specific treatment. All sex offender-specific assessment and treatment records, excluding the DC-579, shall be copied to the DC-14 only, and shall not be maintained on file in either the Medical Record or the DC-15.

4. All files shall be maintained in a secure area, which is readily accessible to the treatment provider.

5. Upon the offender's successful completion of programming, he/she may be provided any/all program-related homework assignments and/or projects that have been maintained in the sex offender-specific record. Upon the offender's release on parole or completion of the maximum sentence, any remaining documents in the file shall be destroyed.

G. Assistor/Peer Programs

Peers can be invaluable in assisting other inmates who may be struggling with any number of

programmatic issues. Sometimes a peer can reach an inmate faster than a service provider. However, because of the potential for problems in situations where one inmate is mentoring another, guidelines for selecting and maintaining assistors are needed.

1. Selection - The treatment team shall initially staff potential assistors/peer group facilitator for inclusion in the program. Every assistor and peer group facilitator must be entering the program on a voluntary basis, must have successfully completed the treatment program, and be in the Maintenance Phase of treatment. An assistor should be misconduct-free for at least one year and typically there should be consensus among team members before making the offender an assistor. Department policy 7.2.1, **"Counseling Services," Section 8, Vote Sheet**, shall be used in the staffing process.

2. At facilities where there is a Residential Unit or Therapeutic Community for sex offenders, the Unit Manager or treatment provider shall delineate assignments, times and places where an assistor and peer groups can meet with his/her assigned inmate(s). The Unit Manager or treatment provider shall determine the number of assignments a particular assistor or peer group facilitator can manage as well as the duration of his/her sessions. All mentoring sessions shall take place in a day room or conference room, which shall be intermittently monitored by correctional staff. The Unit Manager or treatment provider shall also be responsible for the management of inmate movement in those cases where the assistor is

no longer housed in the Residential Sex Offender Unit or Therapeutic Community.

3. A treatment provider in collaboration with the Unit Manager shall coordinate any/all assistor and/or peer group activities at facilities where sex offenders are treated on an "outpatient" basis. In these facilities, the treatment provider shall be responsible for determining the number of assignments a particular assistor or peer group leader can manage as well as the duration of his/her sessions. The treatment provider shall also be responsible for the management of inmate movement associated with assistor and/or peer group activities.

4. Treatment providers shall meet with the assistors and/or peer group leaders at least once monthly to process any concerns or problems as well as any positive feelings associated with the mentoring process.

H. **Managing Program Participants who Accrue Misconduct(s)**

1. When the accrued misconduct is clearly non-sexual in nature and results in three consecutive missed sessions, the offender shall be terminated from his/her current program phase and shall be required to re-take the phase when it is again made available. In a case where imposed sanctions allow, however, the offender may begin the next program phase with his/her group.

2. When the accrued misconduct is clearly sexual in nature, the offender shall be terminated from the program and permitted to restart the program (as it is made available) no sooner than six months subsequent to the misconduct. In these cases, the inmate shall be required to re-start the program from the beginning.

I. **Managing Inmates without a Sexual Conviction who Sexually Assault during Incarceration.**

In cases where an inmate is identified as a perpetrator of a sexual assault during a period of incarceration, he/she shall be considered for placement in SOT. Such programming shall be routinely recommended in cases where allegations lead to convictions as well as in cases where, through the internal investigative process, a decision is made to issue a sexual misconduct charge ***and the inmate is found guilty.***

J. **Collaborating with the Sexual Offenders Assessment Board (SOAB)**

Collaboration requires agencies to share resources and work together to enhance capacity toward attainment of a common goal. Because of the importance of collaboration in attaining goals of reduced recidivism and increased public safety, staff involved in the treatment and management of sexual offenders shall routinely exchange available pertinent information with the SOAB. Treatment staff shall apprise himself/herself of available SOAB evaluations, and shall be receptive to arranging times to answer the SOAB evaluators' questions upon request. Responses to questions

may be communicated verbally or via available written reports and/or email. The SOAB will make their assessment reports available to treatment staff.

No. 10-1015

In the

Supreme Court of the United States

THOMAS WILLIAMS, ET AL.,

Petitioners,

v.

CHARLES S. RENCHENSKI,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do the Fifth, Sixth, and Fourteenth Amendments entitle a prisoner who was never convicted of a sex offense to due process of law before he is classified as a sex offender and enrolled in a sex offender treatment program?

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CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment states that "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

2. The Sixth Amendment states that "the accused shall enjoy the right to a . . . trial[] by an impartial jury." U.S. Const. amend. VI.

STATEMENT

The Court of Appeals faithfully applied this Court's decisions to hold that a prisoner who was never convicted of a sex offense is entitled to due process before prison officials add sex offender status and subject him to sex offender treatment programming. In doing so, it came to the same conclusion as every other Circuit that has addressed the question.

Plaintiff-Respondent Charles Renchenski was neither charged nor convicted of a sex offense. Pet. App. 4a. Nor was he enrolled in sex offender treatment during his first twenty years in prison. Pet. App. 6a. In 2003, he was transferred to a new facility and made the mistake of complaining about one prison guard to another. Pet. App. 7a. The first guard, Petitioner Williams, retaliated by marking Respondent down for a host of correctional programming, including three sex offender programs, and by adding sex offender status. *Id.* He did this without the initial risk assessment required under the program guidelines and though Pennsylvania's sex offender treatment program applies only to prisoners with a past conviction for a sex offense. Pet. App. 6a n.3, 7a, 9a, 23a-24a, 91a-100a.

A sex offender designation is perhaps the most stigmatizing label available in the prison context. Sex offenders inhabit the lowest rungs of the prison status hierarchy and are particularly likely to be subject to assault. *See* Allen D. Sapp & Michael S. Vaughn, *The Social Status of Adult and Juvenile Sex Offenders in Prison: An Analysis of the Importation Model*, 6 J. Police & Crim. Psychol. 2, 4 (1990). Other prisoners look down on them as a morally inferior and degraded subclass whom they may hold in contempt. Thus, "having a pariah label such as

sex offender or child abuser" are "[a]ttributes that elevate the likelihood of a person being a victim." Nancy Wolff et al., *Understanding Sexual Victimization Inside Prisons: Factors that Predict Risk*, 6 Criminology and Pub. Pol'y 535, 539 (2007).

By its terms, Pennsylvania's sex offender treatment program ("SOTP") is limited to prisoners who have been adjudged guilty of a sex offense. Pet. App. 6a n.3, 7a, 23a-24a, 91a-100a. Petitioners' suggestion that the programming is intended for those prisoners whose convictions contain a "sexual component," Pet. 3, is an invention for purposes of this litigation; that language appears nowhere in the Department of Corrections Policy for Sex Offender Treatment. Pet. App. 88a-121a. As the Court of Appeals recognized, sex offender programming is not routinely given to other prisoners, Pet App. 23a-24a, nor did Petitioners introduce any contrary evidence below despite heavily supplementing the record with favorable material.

The details of the program are not fully available because the District Court entered summary judgment against Respondent without permitting him to take discovery. Nonetheless, it appears from the publicly available materials that the program is a highly invasive, psychotherapeutic program that involves the use of medication. In particular, all program staff must have training in pharmacological therapy. Pet. 111a.[1]

All of these considerations distinguish sex offender treatment from other prison programming such as alcohol abuse programming or HIV/AIDS education.

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[1] Petitioners cite the Circuit Court's decision for the proposition that their treatment program does not involve medication. *See* Pet. 3 (citing Pet. App. 6a-7a). However, the decision states no such thing.

Those varieties of programming do not identify the participant as the perpetrator of a specific crime (much less a sex crime), do not employ sophisticated psychotherapeutic techniques, and do not impose on participants the same uniquely stigmatizing label.

Given the invasive nature of the treatment program and the concrete and substantial negative consequences that a sex offender designation can have on those in prison, Respondent appealed through the prison hierarchy. At no point did Petitioners convene or obtain a recommendation from a "treatment team." Pet. 4. Nor did they assess or evaluate him or otherwise grant him a hearing. Rather, Petitioner Sidler, the prison's Chief Pyschologist, simply "support[ed] [Petitioner Williams'] decision to add sex offender status" based on a review of the pre-sentence report. Pet. App. 8a.[2]

Respondent therefore filed this Section 1983 action in the Middle District of Pennsylvania. A magistrate recommended that the case be dismissed. After reviewing Respondent's objections and Petitioners' response, the District Court

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[2] The decision below quoted Petitioner Sidler's reference to an evaluation by a "treatment team." That reference appears in a declaration filed in the District Court and is at odds with the documentary evidence. Petitioner Williams simply marked Respondent down for programming, Pet. App. 9a, and Respondent has never been evaluated or assessed under the SOTP – by a "treatment team" or anyone else.

During proceedings in the District Court, Sidler altered Respondent's records to indicate that he had been placed in "Sex Offender Program Evaluation," rather than programming itself. In fact, as Sidler ultimately was forced to concede, Petitioner Williams marked Respondent down for specific programs, not an assessment. Pet. App. 9a. In addition, any assessment Respondent could, in theory, have received would have evaluated his risk level, which governs treatment intensity, not whether he needed treatment in the first instance. *Id.*

determined that there were factual questions outstanding and requested a supplemental filing from Defendants-Petitioners. It then converted the motion to dismiss into a motion for summary judgment. The District Court granted the motion despite Respondent's pending discovery requests and request that a decision be withheld until he was permitted to take discovery. Pet. App. 11a, 45a & n.13.

On appeal, the Court of Appeals for the Third Circuit reversed in pertinent part. It held that the stigma of a sex offender designation combined with psychotherapeutic behavior modification gave rise to a liberty interest created by the Due Process Clause itself. Pet. App. 15a-28a; *see also Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies."). The Court therefore did not reach Respondent's argument that Petitioners would subject him to an "atypical and significant hardship" that gives rise to a liberty interest created by state law under the test announced in *Sandin v. Conner*, 515 U.S. 472 (1995). (Because the treatment does not impact Respondent's eligibility for parole, there is no argument that Pennsylvania's parole statute gives him a state law liberty interest under *Board of Pardons v. Allen*, 482 U. S. 369 (1987).) The Third Circuit affirmed summary judgment on all of Respondent's remaining claims.

REASONS FOR DENYING THE PETITION

I. THERE IS NO DIVIDE BETWEEN THE CIRCUITS

Petitioners' attempt to manufacture a conflict between the Courts of Appeals collapses under scrutiny. Of the eight cases Petitioners identify, five adopt the Third Circuit's position, two address a different question, and one either agrees with the Third Circuit or does not address the question at hand.

As Petitioners concede, the Eleventh Circuit held in *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999), that the stigma of being classified as a sex offender and mandatory sex offender treatment together give rise to a liberty interest under the Due Process Clause, just as the Third Circuit did here. Pet. 8. Petitioners argue that *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), *Chambers v. Colo. Dep't of Corrs.*, 205 F.3d 1237 (10th Cir. 2000), and *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004), stand for a different proposition – that a prisoner has a liberty interest in avoiding sex offender classification and treatment if parole or good time credits are at stake. Pet. 8. Even if Petitioners were correct, those rulings would not conflict with the decision below: that courts have found a liberty interest in cases where parole is at issue does not preclude finding a liberty interest where parole is unavailable.

Moreover, Petitioners misread at least *Neal* and *Coleman*. In both cases, the liberty interest arose from stigma and mandatory treatment alone; though parole was also at stake, it was not essential to the decisions. Notably, both courts recognized a liberty interest on the basis of this Court's decision in *Vitek v. Jones*, 445 U.S. 480 (1980), in which parole was not at issue. As the Fifth Circuit

explained, "Applying *Vitek* in the sex offender arena, the Ninth and Eleventh Circuits have held that prisoners who have not been convicted of a sex offense have a liberty interest created by the Due Process Clause in freedom from sex offender classification and conditions. We agree." *Coleman*, 395 F.3d at 222. The Court found that the stigma of a sex offender classification followed by mandatory therapy is "materially indistinguishable from *Vitek*" and therefore concluded that "the Due Process Clause . . . provides Coleman with a liberty interest in freedom from the *stigma and compelled treatment*." *Id.* at 223 (emphasis added).

Similarly, in *Neal* the liberty interest arose out of the stigmatizing consequences of the sex offender label and the resulting mandatory treatment program, not from a state-created interest in parole. *See* 131 F.3d at 828-30. Parole was relevant to the decision because treatment programming was a prerequisite for parole, which made an otherwise voluntary treatment program in effect mandatory. *See Neal*, 131 F.3d at 829. But Hawaii's discretionary parole statute meant that there was no more protected interest in parole than there is in this case. *See id.* at 824 & n.3, 828 (citing *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979)). Indeed, the absence of a protected interest in parole was essential to the panel's conclusion that the plaintiffs could bring their challenge under Section 1983 rather than by seeking a writ of *habeas corpus*. *See Neal*, 131 F.3d at 823-24.

The Tenth Circuit's decision in *Chambers* is a bit murky. While the decision arguably depends on a reduction in good time credits, the court held that "it is the

label replete with inchoate stigmatization . . . which requires some procedural scrutiny." 205 F.3d at 1242. In any event, the *Chambers* panel certainly did not limit the existence of a liberty interest to the facts before it and its ruling therefore does not conflict with the decision below.

By contrast, in *Grennier v. Frank*, 453 F.3d 442 (7th Cir. 2006), the plaintiff alleged a liberty interest arising not from the combination of stigma and sex offender treatment but from the combination of a sex offender label and the denial of his parole. As a result, the Seventh Circuit did not consider the question faced by the Third Circuit: whether stigma and compelled sex offender treatment give rise to a liberty interest. It held that stigma *alone* is insufficient to create a liberty interest under federal law, *see id.* at 445 (rejecting argument that "the stigma of being called a 'sex offender' is enough by itself to deprive a person of liberty or property" because "the shame and humiliation of being called a criminal is not enough by itself to require a hearing under the due process clause"), and that Wisconsin's discretionary parole statute does not create state law liberty interest, *see id.* at 446 ("Grennier does not have a liberty or property interest in the prospect of parole under Wisconsin's discretionary system.").

There is no conflict between those holdings and the decision below, which found a liberty interest not in stigma alone or in parole but in the combination of stigma and compelled treatment. To the extent Petitioners postulate a conflict between *Grennier* and *Chambers*, *Neal*, and *Coleman* on the parole issue, this case does not present the facts on which to resolve it. Nor is there any such divide. Each

of *Chambers*, *Neal*, and *Coleman* relied on a mandatory treatment program, whether or not they also took into account parole.

Petitioners' other two cases do not create a conflict. The Second Circuit in *Vega v. Lantz*, 596 F.3d 77, 81-82 (2d Cir. 2010), recognized the principle that "wrongly classifying an inmate as a sex offender may . . . implicate[] a constitutional liberty interest." The plaintiff's claim failed only because he did not allege that the sex-related allegations were false. *See id.* 82. Absent a false classification, he could establish no injury to reputation and thus no stigma. That approach is consistent with the Third Circuit's.

Nothing in *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003), suggests disagreement with the Third Circuit's holding. *Gunderson* involved a challenge to a state sex offender registry, not a prisoner's challenge to treatment programming. Registering did not implicate a liberty interest because the registry was not publicly disseminated but available only to law enforcement and because the registration requirement had no consequences beyond reputational ones. *See Gunderson*, 339 F.3d at 644. Thus, neither element that the Third Circuit found essential to a liberty interest was present in *Gunderson*, and its refusal to recognize a liberty interest is wholly consistent with the decision below.

Nor have the Second and Fifth Circuits "recognized" Petitioners' purported split. Pet. 9. *Coleman* explained that *Gunderson* addressed a distinct legal question, not that the two decisions disagreed as a matter of law. *See Coleman*, 395 F.3d at 222-23 n.26 (explaining that *Gunderson* was inapplicable because it did not

involve a treatment program). Similarly, *Vega* did not disagree with the reasoning of the other Circuit cases it discussed. Rather, the Second Circuit accepted the principle those cases enunciated – that a liberty interest arises from stigma and compelled treatment – but deemed it inapplicable where the plaintiff made no claim of falsity and thus no claim of stigma. *See Vega*, 596 F.3d at 82.

II. THIS CASE DOES NOT PRESENT ISSUES WORTHY OF THIS COURT'S REVIEW

A. The Decision Below Faithfully Applies this Court's Precedent

The Third Circuit properly applied this Court's decision in *Vitek v. Jones*, 445 U.S. 480 (1980), to sex offender treatment programming. Pet. App. 17a-20a. *Vitek* considered a due process challenge to the transfer of a convicted felon to a mental institution. Because the prisoner had been convicted and because prison transfers do not give rise to a liberty interest, *see Meachum v. Fano*, 427 U.S. 215, 224 (1976), he had no liberty interest in avoiding confinement. Nonetheless, the Court held that "'stigma'" and "[c]ompelled treatment in the form of mandatory behavior modification programs" occasion a "loss of liberty" that is "more than a loss of freedom from confinement." *Vitek*, 445 U.S. at 492. While a "criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement," "they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment." *Id.* at 493-94. That holding was reaffirmed in *Sandin v. Conner*, 515 U.S. 472, 479 n.4, 484 (1995).

As the Third Circuit recognized, the stigma of being identified as a sex offender, particularly in the prison context, is at least as substantial as the stigma

of being labeled mentally ill. Pet. App. 18a-19a. And the "psychotherapy" to which Respondent would be subjected in the course of sex offender treatment is the sort of behavioral modification that was at issue in *Vitek*. Pet. App. 19a-20a.

Petitioners do not dispute that the stigma Respondent faces here is comparable to that at issue in *Vitek*. Rather, they argue that sex offender treatment is a more mundane form of behavior modification that is not comparable to the psychiatric treatment at issue in *Vitek* and in this Court's subsequent decision in *Washington v. Harper*, 494 U.S. 210 (1990). Pet. 14-16. Petitioners' argument – in particular, its focus on psychotropic medication – mischaracterizes their own treatment program. While the details are unavailable to Respondent because he has been denied discovery, it is apparent from publicly-available material that the program is a highly-invasive, psychotherapeutic regime of behavior modification that involves medication. Any treatment provider must be trained in psychopathology, psychotherapy, cognitive therapy, and *pharmacological* therapy. *See* Pet. App. 110a-111a (D.O.C. Policy 13.8.1 § 11(D)(2)(c)) (emphasis added). Moreover, the deficient record regarding the psychotherapeutic details of Pennsylvania's treatment program make this case a poor opportunity to decide if sex offender treatment is analogous to the treatment at issue in *Vitek*. *See* below at 14-15.

Nor does *McKune v. Lile*, 536 U.S. 24 (2002), compel a different result. In *McKune*, this Court held that transfer to a different area of the prison and the attendant loss of prison privileges was not so severe a consequence of refusing sex

offender programming as to compel a prisoner to undergo treatment and thereby incriminate himself. *See id.* at 38 (plurality opinion); *id.* at 50-51 (O'Connor, J., concurring in the judgment). Accordingly, the *McKune* plaintiff failed to satisfy the compulsion prong of his self-incrimination claim. *See* U.S. Const. amend. V ("nor shall [any person] be *compelled* in any criminal case to be a witness against himself" (emphasis added)). By contrast, a due process claim turns not on compulsion and the possibility of incrimination but on the existence of a protected liberty interest and a threatened deprivation of that interest without adequate process. *See* U.S. Const. amend. XIV ("nor shall any State deprive any person of . . . liberty . . . without due process of law"). The absence of compulsion within the meaning of *McKune* has no bearing on that inquiry.

Petitioners misunderstand *McKune* when they read it to mean that a due process claim must allege compulsion. The *McKune* plurality proposed that, to constitute compulsion, threatened consequences must involve the sort of "atypical and significant hardship" that would also give rise to a liberty interest under state law. *See McKune*, 536 U.S. at 37-38. It did not suggest that the existence of a liberty interest depends on compulsion. Similarly, Justice O'Connor's opinion allowed a finding of compulsion though the threatened consequences were not so severe as to constitute "atypical and significant hardship," it did not purport to require consequences amounting to compulsion wherever there is a liberty interest. *See id.* at 49-50. Instead, the programming itself may constitute an "atypical and significant hard ship." *See* Pet. App. 24a.

In any event, analogizing compulsion to the "atypical and significant hardship" standard can bear only on liberty interests created by state law (since those are the ones to which the standard applies). *See Sandin*, 515 U.S. at 478 n.4 and 484 (distinguishing between liberty interests arising under state law as opposed to the Due Process Clause itself). Here, the Court of Appeals recognized that Respondent has a liberty interest in avoiding treatment that arises from the Due Process Clause itself. Because the stigma and treatment program give rise to a federally-created liberty interest, there is no need to decide whether the attendant circumstances constitute an "atypical or significant hardship." *See* Pet. App. 24a-25a. A different rule would undermine *Sandin's* distinction between state and federally created liberty interests: there would be no liberty interests under the Due Process Clause unless a prisoner also faced consequences in and of themselves sufficient to create a liberty interest under state law.

B. The Decision Does Not Threaten Proper Administration of Sex Offender Rehabilitation Programs

Pennsylvania's important interest in rehabilitating sex offenders is not implicated here because Respondent was never charged, much less convicted, as a sex offender.[3] In fact, Pennsylvania's sex offender program, by its terms, applies only to those who have been convicted of a sex offense at some point in the past. Pet. App. 91a-100a. As the decision below acknowledges, subjecting prisoners who have not been convicted of a sex offense to sex offender treatment or risk

[3] He is also serving a life sentence without possibility of parole.

assessments is not a routine feature of incarceration in the Commonwealth. Pet. App. 23a-24a.

While States have a valid interest in incarcerating and rehabilitating prisoners for the crimes of which they are convicted, that interest does not allow prison officials to treat prisoners as if they were convicted of a different crime. *Cf. Apprendi v. New Jersey*, 530 U.S. 466 (2000). Requiring due process before Petitioners "add sex offender status" and force Respondent to undergo treatment reserved, under their own policies, for prisoners convicted of a sex offense does not undermine the administration of Pennsylvania's prisons.

Nor does the Third Circuit's holding threaten to interfere with other rehabilitative programming, such as alcohol abuse education. Pet. 11. Unlike sex offender treatment, substance abuse counseling is regularly provided in the prison context to those who have been convicted of other crimes. And even if substance abuse programming were limited to actual offenders, designation as a drug abuser generates much lesser stigma than does designation as a sex offender. Nothing in the decision below suggests that due process is required before inmates are enrolled in substance abuse programming.

III. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT A POOR VEHICLE BY WHICH TO ADDRESS THE QUESTION PRESENTED

This case came on appeal after the District Court asked Petitioners to submit information clarifying factual disputes, transformed their motion to dismiss into a motion for summary judgment, denied Respondent's request to take discovery, and granted the motion. Pet. App. 11a, 45a, 55a-56a. The Third Circuit held that this

was error, but one which was harmless because Respondent succeeded on his due process claim without the benefit of discovery material while his other claims failed as matter of law. Pet. App. 44a-49a.

Notwithstanding the harmlessness of the error for purposes of proceedings in the Court of Appeals, the incomplete record will substantially hamper this Court's review. The heart of Petitioners' claim of error is the assertion that their programming is not so psychotherapeutic as the treatment at issue in *Vitek*. The incomplete record concerning the details of Pennsylvania sex offender treatment therefore goes to the core of the issue proposed for this Court's decision. Similarly, the absence of discovery into the consequences of refusing treatment will prevent full consideration of Petitioners' argument that any treatment is not compulsory.

CONCLUSION

For the foregoing reasons, the Court should not grant a writ of certiorari.

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In the Supreme Court of the United States

THOMAS WILLIAMS, ET AL.,
Petitioners

v.

CHARLES S. RENCHENSKI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does a convicted prisoner have a constitutionally protected liberty interest in not attending an in-prison sex offender treatment program?

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Mayo Clinic, Compulsive Sexual Behavior
www.mayoclinic.com/health/compulsive-sexual-behavior/DS00144/DSECTION=treatment-and-drugs 2

ARGUMENT

Petitioners ask the Court to review this case to answer one question: whether prisoners have a protected liberty interest which prevents prison officials from assigning them to participate in an in-prison sex offender treatment program ("SOTP"). The Court of Appeals answered this question in the affirmative, holding that a) requiring a prisoner to participate in a once-a-week group session in the prison is the same as committing him to a mental hospital; and b) the prisoner's participation in this program is not "compelled" but is nevertheless involuntary.

Petitioners submit that this decision is not only incoherent on its own terms, but represents an unjustified extension of the Court's decision in *Vitek v. Jones*, 445 U.S. 480 (1980); moreover, this decision, if left unreviewed, has the potential to undermine the administration of a wide variety of similar rehabilitative programs directed at drug and alcohol abuse, HIV/AIDS education and so forth.

Respondent does not vigorously argue that the issue raised by petitioners is not significant or that it lacks importance for those who manage our nation's prisons. Instead, he attempts to muddy the waters by changing the substance of the issue presented, focusing on facts which were not relied upon by the Court of Appeals and are irrelevant to deciding the legal issues involved, and generally mischaracterizing the record. In the process, respondent erroneously asserts that the Court of Appeals' decision is fully supported by this Court's precedents, that there is no

conflict among the Circuits, and that present case is a poor vehicle to address the issue presented.

For the reasons explained below, respondent's position is based on misconceptions regarding the record and a misleading, if not distorted, characterization of the decision of the Court of Appeals. Petitioners have properly raised a question of substantial importance. The arguments raised by respondent do little to demonstrate otherwise and, if anything, tend to underscore the importance of the Court resolving the issue presented in the petition.

I. This Case Does Not Involve The Forced Administration of Medication As In *Washington v. Harper,* 494 U.S. 210 (1990).

Respondent repeatedly asserts that Pennsylvania's Sex Offender Treatment Program is "comparable" to the psychiatric regimes that were at issue in *Vitek* and *Harper* because Pennsylvania's program, in his artful phrase, "involves" the use of medication. Br. in Opp. at 3, 11. Respondent, however, mischaracterizes Pennsylvania's program, his own claims in this case, and the Court of Appeals' decision.

The protocol for the SOTP does provide that, "on rare occasions," psychiatrists may attempt to treat sex offenders with "anti-androgens and Selective Serotonin Reuptake Inhibitors (SSRIs)."[1] Pet. App.

[1] Anti-androgens reduce sexual urges in men by reducing the biological effects of sex hormones. SSRIs are a class of antidepressants used to treat compulsive behavior. *See, e.g.* www.mayoclinic.com/health/compulsive-sexual-behavior/DS00144/DSECTION=treatment-and-drugs (visited March 24, 2011).

114a. The protocol, however, does not provide for the *forced* or *involuntary* administration of these drugs, nor has respondent ever claimed that he will be subjected to such involuntary medication.

Had respondent made such a claim, it would of course have been squarely governed by *Harper*. The courts below could have disposed of it in a single sentence, and their extensive discussions of the existence *vel non* of respondent's liberty interest would have been both unnecessary and inexplicable. But in fact, neither the Court of Appeals nor the District Court said anything to indicate that the involuntary administration of medication was an issue in this case, and they mention *Harper* only in passing. *See* Pet. App. 17a, 67a-68a.

Rather, the Court of Appeals (correctly) described the SOTP as a series of small-group sessions that meets once a week for two hours within the prison, Pet. App. 7a, and (incorrectly) held that assignment to this program is indistinguishable, for due process purposes, from involuntary commitment to a mental institution. Pet. App. 19a. We submit that, far from "faithfully appl[ying] this Court's precedents," Br. in Opp. at 10, the Court of Appeals' decision is a radical and unjustified extension of them, which the Court should review and reverse.

II. Pennsylvania's Sex Offender Treatment Program Is Not Limited To Prisoners Who Have Been Convicted Of A Sex Offense.

Respondent maintains that the DOC's desire to have him participate in SOTP is an anomaly which is

not provided for under state law and which is undeserving of the Court's attention. Respondent maintains that SOTP is intended only for prisoners who have been convicted of a specific sex offense and that his inclusion must be the result of some type of retaliatory or other improper animus. However, this contention is not supported by the record or by Pennsylvania state law.

Section 9718.1 of Pennsylvania's Judicial Code provides that persons convicted of certain enumerated sex offenses "shall attend and participate in a [DOC] program of counseling or therapy designed for incarcerated sex offenders." Pet. App. 6a n.3 (quoting 42 Pa. C.S. § 9718.1). While it is correct that SOTP is mandatory for prisoners convicted of certain sex offenses, respondent commits a logical fallacy when he concludes that participation in SOTP must therefore be limited to such offenders.

If Pennsylvania law actually restricted SOTP to convicted sex offenders, as respondent claims, he would in all likelihood have a state-created liberty interest. However, despite maintaining that the Court of Appeals simply did not reach the issue, Br. in Opp. at 6, the Court of Appeals specifically found that respondent never raised it. Pet. App. 18a n.8. Furthermore, contrary to the assertions made by respondent, Br. in Opp. at 2-3, the record clearly shows that the DOC includes prisoners who have not been convicted of a sex offense in SOTP.

It is the DOC's standard practice to recommend prisoners like respondent for SOTP where it is believed that they would benefit from such treatment. SCI-Coal Township's Chief Psychologist set forth the

DOC's general policy regarding placement in SOTP in his declaration which was submitted to the District Court. *See* Declaration of John P. Sidler, ¶10.[2] While the SOTP may have been created primarily for "convicted" sex offenders, respondent's assertion that the DOC does not use SOTP for other prisoners is simply false and not supported by the record.

III. The Principles Underlying This Court's Decision In *McKune v. Lile*, 536 U.S. 24 (2002) Should Be Consistent With The Court's Jurisprudence Under the Fourteenth Amendment.

In *McKune v. Lile*, 536 U.S. 24 (2002), a majority of the Court held that a prisoner's Fifth Amendment right against self-incrimination was not violated when he was required to participate in a prison sex offender program. In this case, the Court of Appeals correctly applied *McKune* to hold that respondent likewise had suffered no Fifth Amendment loss, because the sanctions that might be imposed on him if he refused to participate in the program did not amount to "compulsion." Pet. App. 30a-37a. Without explanation, the Court of Appeals nevertheless held that the availability of these same sanctions rendered respondent's participation involuntary. Pet. App. 26a.

Respondent attempts to sidestep this obvious inconsistency by asserting that "[t]he absence of compulsion within the meaning of *McKune* has no

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[2] Sidler's declaration, although part of the record, was not included in the Appendix to the Petition. It is attached to Petitioner's Reply Brief. *See* Supplement to the Appendix, 122a-34a.

bearing" on the due process inquiry, Br. in Opp. at 12, but he is mistaken. While the Due Process Clause does not require "compulsion" in so many words, it does require that a person be "deprived" of a protected interest by the action of the state[3]; and it would surely be an odd use of language to say that the state has "deprived" someone of that which he or she has voluntarily surrendered.

Thus, in both *Vitek* and *Harper*, the involuntary nature of what was happening to the prisoner was the starting point of the Court's due process analysis. *See Vitek*, 445 U.S. at 482-483 ("The question in this case is whether the Due Process Clause ... entitles a prisoner ... to certain procedural protections ... before he is transferred *involuntarily* to a state mental hospital") (emphasis added); *Harper*, 494 U.S. at 213 ("The central question before us is whether a judicial hearing is required before the State may treat a mentally ill prisoner with antipsychotic drugs *against his will*") (emphasis added). Whether respondent's participation in SOTP is voluntary or involuntary is therefore critical in determining whether he has been "deprived" of a protected liberty interest.

The Court of Appeals held that respondent was not compelled to participate in SOTP for purposes of the Fifth Amendment, but that his participation in SOTP was nevertheless involuntary for purposes of the Fourteenth Amendment. The Court of Appeals made no attempt to explain this inconsistency, and respondent says only that the Fifth Amendment and

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[3] "No state shall ... *deprive* any person of life, liberty or property without due process of law." U.S. CONST., Amend. XIV, § 1 (emphasis added).

the Fourteenth Amendment are different. The Court should review this case to provide the coherency which the Court of Appeals did not.

IV. This Case Squarely Presents an Important and Recurrent Issue in Prison Administration.

Finally, respondent claims that this case is a "poor vehicle" for resolving the question presented because, in his view, the record contains insufficient "details" about the operation of Pennsylvania's sex offender program. Br. in Opp. at 14-15. But the details that respondent now says "go[] to the core of the issue" (*Id.* at 15) – whether and under what circumstances medications are administered, for example – were of no importance whatever to the Court of Appeals. In the view of the Court of Appeals, it was enough that Pennsylvania's program was aimed at "behavior modification," Pet. App. 16a-17a, and that designating a prisoner for participation could have a "stigmatizing effect." Pet. App. 22a.

Thus, what respondent calls a "deficient" and "incomplete" record, Br. in Opp. at 11, 15, simply demonstrates the unprecedented breadth of the Court of Appeals' decision. As we have already pointed out, Pet. at 11-12, the Court of Appeals' approach calls into question the viability of a wide variety of prison rehabilitative programs which are likewise aimed at modifying behavior, and which could likewise be thought to be "stigmatizing." The Court should review this decision precisely *because* the Court of Appeals thought that the "details" were unimportant.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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DATE: March 28, 2011

SUPPLEMENT TO THE APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHARLES S. RENCHENSKI, PLAINTIFF	NO. 3:06-CV-278
v.	(Chief Judge Richard P. Conaboy)
MR. THOMAS WILLIAMS, et al.,	(Magistrate Judge Smyser)
DEFENDANT	(Electronically Filed)

UNSWORN DECLARATION OF JOHN P. SIDLER

I, JOHN P. SIDLER, hereby state under the penalty of perjury that the following is true and correct and based upon my personal knowledge:

1. I am presently employed as the Chief Psychologist at the State Correctional Institution at Coal Township (hereinafter "SCI-Coal Township") of Pennsylvania Department of Corrections (hereinafter "DOC"). I have held this position since November, 2000.

2. I received a B.A. in Journalism and B.S. in Psychology in 1982 and a Master's Degree in Psychology in 1985. I am currently licensed as a Professional Psychologist and have been so licensed since 1994. Prior to my employment with the DOC, I was employed by Northumberland County Area Agency on Aging from 1984-1986 and at the Selinsgrove Mental Retardation Center from 1986-2000.

3. As the Chief Psychologist at SCI-Coal Township, my duties and responsibilities include, but are not limited to the overall administration and supervision of the department, administration and interpretation of psychology testing; developing and implementing inmates' psychological plans and strategies; prison rape elimination act coordinator; and serving as a member of the institutional multi-disciplinary treatment committees. In addition, I am

the coordinator of the SCI-Coal Township Sex Offenders Treatment Program (hereinafter SOTP).

4. I also familiar with the standard operating policies and procedures followed at SCI-Coal and the DOC. I am also familiar with and have access to all records maintained by the institution in the course of regularly conducted business.

5. Upon incarceration, Correctional Plans are developed for inmates based upon their initial classification and summary evaluations. These evaluations include, but are not limited to psychological and educational assessments as well as the nature and underlying circumstances of the offense for which the inmate is incarcerated. A Correctional Plan is developed for every inmate by the DOC Treatment team, which includes recommended programming, based upon his or her individual rehabilitative needs. These rehabilitative needs

include a wide range of programs including but not limited to vocational and educational programming, drug and alcohol treatment, violence prevention and sex offender treatment. The Correctional Plan is designed to address an inmate's specific needs to prevent re-offending and to enable inmates to transition back into society upon their release from prison.

6. While the recommended programming may be a requirement of an inmate's correctional plan, an inmate's participation in the specific program is voluntary. Inmates can and do refuse to participate in specific DOC programs. Willingness or refusal of an inmate to participate in required DOC programming may affect an inmate's parole status and possible sentence commutation.

7. Prior to 1999, no standardized SOTP was utilized within the DOC. Prisons within the DOC did

provide sex offenders, inmates with a history of sex offenses and inmate's who offenses contained a sexual component with sex offender programming. The sex offender programming was based upon several programs approved by the DOC at the institutional level rather than a uniform, standardized DOC program.

8. In November, 1999, the DOC instituted the Sex Offenders Treatment Program ("STOP"). Since the SOTP inception in 1999, the program has been revised in accordance with the standards and practices of the Association for the Treatment of Sexual Abusers, the Pennsylvania Sex Offenders Assessment Board and the Sex Offender Treatment Programs operating in other state correctional jurisdictions and agencies. The DOC's SOTP was recently modified in 2005 o standardize treatment at the prisons across the DOC and to update treatment

modalities. (*See* Exhibit 1 attached. Attached as Exhibit 1 is a true and correct copy of the Sex Offender Treatment Policy)

9. In accordance with the current SOTP, staff are not required to retroactively complete risk assessments on inmates incarcerated prior to the effective date of the new policy. Pursuant to the new treatment plan, assessments of those inmates occurs at the time the staff member is ready to initiate a new sex offenders group. In addition, if an inmate refuses to be interviewed for the purposes of risk assessment, it is noted on his in file. (*Id.*, § 11, B 4 (a)).

10. All inmates who are serving prison terms related to sex offenses, i.e. rape, statutory rape, involuntary deviate sexual intercourse, etc., are prescribed sex offender programming as a part of their prescriptive programming under the current SOTP, as well as any past sex offender programming.

In addition, inmates who have a prior history of sexual offenses or the nature of underlying circumstances of their offense contains a sexual component, SOTP was and is made a part of their DOC programming. Due to the sexual nature of the inmate's offense, his or her individual Correctional Plan automatically includes a program for sexual abuse treatment.

11. I am familiar with plaintiff, Charles Renchenski, AP-8124. As Chief of Psychology at SCI-Coal Township, I have access to Renchenski's institutional files, including his DOC Correctional Plan.

12. According to Renchenski inmate record, Renchenski was charged and convicted of murder and subsequently was sentenced by Clearfield County Judge John Kelly on January 30, 1985 to life imprisonment. (*See* Exhibit 2 attached. Attached as

Exhibit 2 is a true and correct copy of Renchenski's Sentence Status Summary).

13. The official version of his crime indicates that there was a sexual component to the crime, as Renchenski was engaged in a sexual act with the victim when the homicide occurred. During the course of the sex act, the victim was choked and beaten numerous times about the head, breast and genital area. In addition, the victim's breasts were slashed with a razor blade. (*See* Exhibit 3 attached. Attached as Exhibit 3 is a true and correct redacted copy of portions Renchenski's confidential Pre-Sentence Reoprt, dated July 24, 1984 and the Criminal Complaint dated August 21, 1982).

14. Renchenski was received by the DOC in 1985, convicted of Murder and sentenced to life imprisonment. At the time of his reception into the DOC, no standardized SOTP was in place; however,

Renchenski's Correctional Plan or Prescriptive Program noted Renchenski's areas of concern as drug and alcohol, assault and sexual. The decision to recommend Renchenski for sex offender programs was based upon the Treatment team's evaluation of him coupled with the sexual component Renchenski's offense. (*See* Exhibit 4 attached. Attached as Exhibit 4 is a true and correct copy of first page of Renchenski's Initial Classification and Summary Evaluation, dated February 20, 1985).

15. Although Renchenski is serving a life sentence and is not eligible for parole, the DOC has and continues to recommend a rehabilitative correctional plan for him. Renchenski's DOC correctional plan has been revised due to changes and the implementation of the DOC's SOTP's. Due to the sexual component of Renchenski's crime, as he was engaged in a sexual act with the victim when the

homicide occurred, his DOC Correctional Plan requires participation Sex Offender Program. (*See* Exhibit 5 attached. Attached as Exhibit 5 are true and correct copies Prescriptive and Correctional Plans)

16. On June 14, 2005, Renchenski was notified that a new Sex Offender's Program Group was to begin at SCI-Coal Township. This program allowed enrollment of inmates who in the past denied sex offenses. Renchenski refused to participate in this program, stating that he was never charged with nor convicted of a sex offense. Renchenski has been informed by his counselor and DOC staff on several occasions that due to the sexual component of his crime, SOTP is requirement in his correctional plan. Due to Renchenski's refusal to attend the Sex Offenders Program Group, he was not assessed. (*See* Ex. 6 attached. Attached as Ex. 6 is a true and correct

copy of the June 14, 2005 Notification Memorandum to Renchenski and Renchenski's response dated June 17, 2005; in *addition, see* Ex. 1 pg 9; Doc. No.18).

17. Renchenski has not been re-evaluated or re-assessed under the current SOTP because he has previously been recommended for the program based upon the sexual component of his offense. In addition, under the current SOTP, staff are not expected to retroactively complete risk assessments on an inmate incarcerated prior to the effective date of the new sex offenders treatment group. Pursuant to the new treatment plan, Renchenski would be assessed for risk level at the time the staff initiates a new group.

18. On January 18, 2007, Renchenski's Correctional plan noted that he was recommended for Sex Offender Program Evaluation. It was noted that he refused to participate. The notation on his

Correctional Plan was in error, as Renchenski has refused to attend the new Sex Offender Program Group. On April 10, 2007, Renchenski sent an Inmate Request to me concerning this error and I informed him that the change was made on his Correctional Plan. Subsequently, I amended his Correctional Plan to indicate that he refused to participate in the Sex Offenders Program, Mod-High Intensity.

19. Renchenski has been encouraged on numerous occasions to participate in the SOTP. Although he has continually refused participation in the SOTP, his refusals have not affected his parole status, as he is serving a life sentence without parole, nor has he sought a sentence commutation. While Renchenski's name appears on the institutional sex offender's roster as a possible sex offender because of the sexual component of his offense, he has not been classified as a sex offender because he has refused to

engage himself in any of the Sex Offender Treatment Programs. Renchenski can request, in writing, at any time to be assessed in the SOTP, by simply filling out an Inmate Request to Staff Member Form. To date, Renchenski has not requested to be assessed under the SOTP.

20. Due to the sexual component Renchenski's crime, as he was engaged in a sexual act with the victim when the homicide occurred, his DOC Correctional Plan will continue to require participation Sex Offender Treatment Program, until his participation in the programming determines otherwise.

5/24/07
DATE

/s/ John P. Sidler
JOHN P. SIDLER
Chief Psychologist
SCI-Coal Township